

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ROBOCAST INC., a Delaware  
Corporation,  
Plaintiff,

v.

Civil Action No.

NETFLIX INC., a Delaware  
limited liability company,  
Defendant.

1:22-cv-00305-JLH

VIDEOCONFERENCE HEARING

DATE: Monday, July 22, 2024

TIME: 10:03 a.m.

BEFORE: Honorable Christopher Burke

LOCATION: Boggs Federal Building

844 North King Street, Unit 28

Wilmington, DE 19801

REPORTED BY: Andrew Weader

JOB NO.: 6811211

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ALSO PRESENT:

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Ann Herman, Law Clerk (by videoconference)

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Page 5

E X H I B I T S

NO.	DESCRIPTION	ID/EVD
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P R O C E E D I N G S

THE REPORTER: We're on the record at 10:03 a.m.

THE COURT: It says my camera's on and I can see myself on screen, but anybody else having a problem seeing me? Okay.

Mr. Brauerman, what color is my tie?

MR. BRAUERMAN: Red and blue.

THE COURT: You got it. Okay. Good.

All right. So I know we have counsel for each side here with us, and we have our court reporter with us. We thank our court reporter for their service.

And so in light of all that, let's go on the record. Let me just say a few things for the record.

We're here this morning in two related matters. The first is a miscellaneous case titled Rizzi, et al. vs. Netflix Inc. That's civil action number 24-MC-106 in our court.

And then additionally, we're here to resolve some discovery disputes in a related matter, titled Robocast Inc. vs. Netflix Inc., which is civil action number 22-305-JLH in our court.

1 I should say that the miscellaneous  
2 matter ends with a dash CJB, as there's a consent --  
3 in that matter.

4 All right. Before we go further, let's  
5 have counsel for each side identify themselves for the  
6 record. We'll start first with counsel for the  
7 plaintiff's side, and we'll begin there with Delaware  
8 counsel.

9 MR. BRAUERMAN: Good morning, Your  
10 Honor. Steve Brauerman from Bayard. I'm joined on  
11 the line by my colleague, Ronald Goldman, also from  
12 Bayard. And then from lead counsel at McKool Smith,  
13 Steven Rizzi, Ramy Hanna, Grant Johnson, and Marial  
14 Talmage.

15 And I believe with Your Honor's  
16 permission, Mr. Rizzi, Ms. Talmage, and Mr. Johnson  
17 will address the court today.

18 THE COURT: Okay. Thank you.

19 We'll do the same for counsel for  
20 Defendant's side. And we'll begin with Delaware  
21 counsel.

22 MS. FARNAN: Good morning, Your Honor.  
23 Kelly Farnan from Richards, Layton & Finger for  
24 Netflix. From my office, I'm joined by Sara Metzler

1 and also our summer associate, Britton Ody.

2 From Latham & Watkins today, we're  
3 joined by Tara Elliott, Rachel Cohen, Ashley Fry, and  
4 Alessandra Schaszberger.

5 We also have on the line today Laurie  
6 Charrington from Netflix. And each of Ms. Elliott,  
7 Ms. Cohen, Ms. Fry, and Ms. Schaszberger will handle  
8 some of the issues before the court.

9 And then one last administrative  
10 matter, Your Honor, this was set on our calendars till  
11 1 o'clock. I have a pretrial conference with Judge  
12 Hall at 1 o'clock, and so Ms. Metzger will be on the  
13 entire time, but with Your Honor's permission, I might  
14 need to be excused around 12:30 if we're still going.

15 THE COURT: Okay. My hope is that  
16 we'll be done by 12:30. I have another -- more  
17 hearings thereafter today.

18 So my hope is to go from now till no  
19 later than 12:30. Maybe, you know, do an hour on the  
20 motion to quash, an hour on Defendant's discovery  
21 disputes, which are many, and then maybe a half hour  
22 on Plaintiff's dispute, which is pretty focused.  
23 Something like that. But I'll try to keep it moving  
24 just because I've got more hearings today, and so I

1 got to be focused.

2 Okay. All right. Good to be with you  
3 all.

4 All right. Let's go to the motion to  
5 quash in the miscellaneous case first. In some way,  
6 some parts of that motion also relate to some parts of  
7 Defendant's discovery disputes, so it makes sense to  
8 do that motion first.

9 Who's going to be speaking on behalf of  
10 the plaintiffs, or the movements, in that case?

11 Someone may be on mute, but --

12 MR. RIZZI: Yes, Your Honor. I  
13 apologize. This is Steven Rizzi. I will be handling  
14 that portion of today's hearing.

15 THE COURT: Okay. And I should say  
16 we're on videoconference here, so for counsel who are  
17 arguing, when you're arguing, I'd ask you -- unless  
18 there's some technology problem -- to be on video.

19 If you're not arguing, just listening,  
20 you don't have to be on video if you don't want to.  
21 You can just put your screen on, you know, non-video  
22 and just listen in.

23 Oh, also, I should say we got a request  
24 from at least one member of the public for the dial-in

1 for this call, so parties should assume -- parties  
2 should understand, as they would with any  
3 videoconference hearing, that it is public and they  
4 should assume that there could be members of the  
5 public listening.

6 All right. With that said, let me turn  
7 to movant's side.

8 And, Mr. Rizzi, let me just jump in  
9 with some questions for you. And I'll do the same for  
10 the other side as well.

11 In my view, I wonder -- I don't know if  
12 Plaintiff's side as a different view. Obviously the  
13 parties briefed the factors under Second Circuit law  
14 that our court utilizes, or has utilized, I think the  
15 Eighth Circuit Shelton factors. There's a lot of  
16 overlap there, et cetera.

17 But in terms of how to do the analysis,  
18 I'm wondering whether you -- why it wouldn't be the  
19 case that what I would do is kind of try to figure  
20 out, look, what are the key buckets of  
21 testimony/documents, i.e. the key topics, that the  
22 defendant says they're seeking from their subpoenas to  
23 you. And then take a look at each of those key  
24 buckets -- say there's three or four -- and assess;

1     you know? Well, to what extent -- is there a great  
2     need or not a great need? You know, to what extent  
3     would this information be relevant? To what extent  
4     might it call for privileged information?

5                     Do you disagree that that's kind of a  
6     fruitful way to go about this analysis?

7                     MR. RIZZI: Your Honor, I think that's  
8     a perfectly logical way to proceed.

9                     THE COURT: Okay. Let me just tell you  
10    what I took away from the briefing, and for both  
11    sides' benefit. And again, I'll talk to Defendant's  
12    counsel in a minute and they can tell me if they think  
13    this list is under or overinclusive.

14                    It seems like maybe the focus and the  
15    briefing was on something like, you know, four buckets  
16    of information. One bucket being information about  
17    Mr. Rizzi's investment in Plaintiff. A second bucket  
18    being about, you know, information about patent  
19    licensing history of the plaintiff. A third bucket  
20    being information relating to litigation funding or  
21    investor-related communications/conversations, et  
22    cetera. And a fourth bucket being information  
23    relating to prosecution of the patents in suit.

24                    That's what it seemed like were the top

1 ones that were most frequently mentioned in the  
2 briefing.

3 Mr. Rizzi, do you think there's a topic  
4 I didn't mention there that is going to be relevant to  
5 what we're talking about?

6 MR. RIZZI: Your Honor, I think those  
7 fairly capture the categories of information upon  
8 which Netflix based its subpoena.

9 The only one clarification is the  
10 bucket about investor relations. You know, I --  
11 there, they seem to be arguing more broadly about me  
12 playing some sort of a business role beyond role as  
13 counsel as justifying it. I think it falls into that  
14 bucket, but I just wanted to add that clarification.

15 THE COURT: Okay. And I may have some  
16 questions for you about those buckets, but I think  
17 maybe stepping back, one question I had that -- you  
18 know, this briefing was done, you know, I think in  
19 March and maybe early April. We're now in July. And  
20 I think it's the case, tell me if I'm wrong, that an  
21 interval, there have been a lot of depositions taken  
22 by both sides. I know one of our disputes today is  
23 about a lingering depo, but --

24 So I guess I'll ask both sides, but

1 I'll ask you first. Are you asserting that now that  
2 we see what discovery has been taken in the interval  
3 between when the briefing ended and now, that  
4 Defendants have received a bunch of information about  
5 certain of these buckets, such that any additional  
6 information that might be gleaned from you would be  
7 said to be largely cumulative, or are you not making  
8 that?

9 MR. RIZZI: Absolutely, Your Honor. I  
10 mean, I would go further and say that discovery that's  
11 occurred since has only confirmed what we alleged back  
12 in February/March, that the subpoena was ill-advised  
13 to begin with.

14 And every category of information, that  
15 it was asserted to be required from me personally, was  
16 either provided, or certainly was available to be  
17 provided through depositions and, you know, and other  
18 discovery of Robocast witnesses.

19 THE COURT: And not to interrupt, but  
20 is it probably correct that to the extent that  
21 discovery was sought or asked about or obtained, or  
22 wasn't, I probably don't have anything in the record  
23 in front of me one way or the other about what  
24 happened since the briefing ended on that front?

1 MR. RIZZI: Yeah. I think that's fair,  
2 Your Honor. I'm not aware of any supplementation of  
3 the record since depositions have occurred.

4 THE COURT: Okay. I cut you off. What  
5 else did you want to --

6 MR. RIZZI: Oh, I was going to say in  
7 addition to the depositions of Robocast witnesses,  
8 also they deposed all of the Robocast prosecution  
9 counsel. So --

10 THE COURT: And I don't know how  
11 fruitful it will be since it's not part of the record,  
12 and since anything said about it would essentially be  
13 attorney argument, to ask you -- tell me, you know,  
14 what questions were asked or what information was  
15 obtained about X or Y.

16 Like, you know, it might have been  
17 relevant or important to know one way or the other  
18 from either side. Like, okay. A bucket of  
19 information that's sought from Mr. Rizzi is  
20 information about investment in Robocast say back in  
21 '08 or whatever it was.

22 I know Plaintiff's response is, look,  
23 you know, your investment was less than one percent  
24 and it ended two years later. And there's lots of

1 other investors. And so what you're really getting at  
2 is what were people thinking when they were investing,  
3 and how does it relate to Robocast's value and the  
4 value of its IP. You know, you can get that from a  
5 lot of other people.

6 You know, like one potentially helpful  
7 fact that may have occurred since then is, well, do we  
8 have any discovery taken on, like, you know, who  
9 invested in Robocast in or around that time period,  
10 and why, or anything?

11 You know, again, I don't know how  
12 fruitful it's going to be to ask you about it, but  
13 I'll use it -- I'll just use that as an example, you  
14 know, and ask, you know, was discovery taken about  
15 that subject as the others -- other than you? And  
16 could some record be made one way or the other by  
17 either side about whether there is such discovery  
18 available or there isn't?

19 MR. RIZZI: I would say, Your Honor,  
20 there certainly has been discovery -- complete  
21 discovery of what we call the cap tables, or what  
22 Robocast refers to as the cap tables, which are a  
23 complete record of every investment in Robocast, I  
24 think, going back to day one.

1                   And also, the related entity, this IMU,  
2                   which was a holding company, and that was the actual  
3                   entity that I was briefly invested in.

4                   So complete information about all the  
5                   investors has been provided. I mean, I will note that  
6                   what's also relevant here is what discovery Defendant  
7                   chose not to pursue. And that includes discovery from  
8                   the major investors.

9                   There were -- as Your Honor's aware, my  
10                  investment was very small and very brief. There are I  
11                  believe well over 100 investors, the vast majority of  
12                  which invested far more than I did, invested much  
13                  earlier than I did. Certainly some at the same time.  
14                  And continued to be investors, including ones, you  
15                  know, prominently featured in the documents.

16                  And to my knowledge, Netflix did not  
17                  even seek discovery from any other investor. And I  
18                  would submit that's telling that the only investor  
19                  that they believe discovery is relevant from is me.

20                  And that, to me, just speaks volumes in  
21                  terms of what the -- you know, the true motive here.  
22                  It's not about the investment. It's about who made  
23                  the investment and, you know, getting to information  
24                  from litigation counsel.

1 THE COURT: Okay. And then another  
2 kind of framing question, and you know, this goes I  
3 think to the more general assertions about your role.  
4 You know, look, it could be the --

5 I understand your assertion is that,  
6 you know, your role was as patent counsel, licensing  
7 counsel, litigation counsel through these years. You  
8 know, you could think of scenarios where you have a  
9 large company with hundreds of employees. And they,  
10 you know, for all their litigation needs, hire the  
11 same firm. And largely, you know, led by the same  
12 partner over a period of years. But it's a big  
13 company with lots of people, you know, who are  
14 involved in lots of decisions. And, you know, would  
15 interact with outside counsel, even if it's the same  
16 firm and, you know, led by the same lead partner.

17 Thinking of another scenario where  
18 you've got a very small company, you know, that  
19 essentially has, like, a couple of people -- two or  
20 three people, you know, operating it for years. And  
21 they rely on their outside counsel as, like, one of  
22 just -- one or two or three people who essentially are  
23 involved in almost every conversation, make almost  
24 every decision.

1                   You know, and it could be said that  
2     lots of those decisions in some way could implicate  
3     legal counsel, but, like, essentially, the company is  
4     run by, like, four people, and one of them was the  
5     lawyer. An outside lawyer. Someone who's an employee  
6     of the company, but worked at a firm, but essentially  
7     served, like, you know, in-house counsel and, like,  
8     one of three or four people who was basically in every  
9     meeting.

10                  You know, the former, you know, seems  
11     like more of a traditional, you know -- probably not  
12     likely to be seeking discovery from that outside  
13     lawyer scenario. Where the latter, you might say it's  
14     a little more unusual. And maybe that one lawyer, you  
15     know, is so omnipresent, so integrated into this tiny  
16     team of people who are leading the company that it's a  
17     little -- like, you might not expect that person, you  
18     know, later to be, you know, litigating cases with  
19     them because they were so intricately enmeshed in the  
20     company's, you know, ascent.

21                  I think -- suggesting that what  
22     happened with you is more like the latter scenario.  
23     And so, you know, what can you tell me or what do you  
24     want to say is in the record about, like -- you know,

1 was Robocast, for these years -- from like '08 through  
2 the present -- were they, like, a couple-person  
3 company and essentially relied on you to be, like, one  
4 of their four or five people that were in on all the  
5 decisions, or was it much more vast than that, or  
6 something in-between?

7 MR. RIZZI: It certainly was a small  
8 company. And, you know -- run by Mr. Torres. And in  
9 that time period, I believe from, you know, '08 on,  
10 also included Mr. Brett Smith, in-house counsel. So  
11 they had their own in-house counsel pretty much  
12 continuously more or less from that -- I think there  
13 may have been a brief period where he wasn't in-house  
14 and he may have been working as outside counsel.  
15 But --

16 THE COURT: That's said to be, like,  
17 two years.

18 MR. RIZZI: That sounds about right.  
19 But at no time during that period did I ever play more  
20 than the role of outside counsel advising on patent  
21 enforcement, litigation strategy, and those matters.  
22 I just never played anything beyond that in terms of a  
23 business role.

24 I never -- I was not participating in

1 every single meeting by any stretch, because frankly,  
2 you know, the client really didn't have the resources  
3 to even seek to use me in that role.

4 I was always, during the entire time, a  
5 partner at a law firm, whether it was Foley & Lardner  
6 for the most part. And then after that, King &  
7 Spalding, and then -- years, McKool Smith.

8 So yes, it's a small company, but no, I  
9 mean, there was never a scenario where my role went  
10 beyond legal counsel.

11 And even then, you know, because they  
12 had in-house counsel, it was discreet matters in which  
13 my services were sought.

14 THE COURT: And, like, I'm not holding  
15 you to this, but throughout these years, approximately  
16 how many people were employees at Robocast?

17 MR. RIZZI: Many more in the early  
18 days. And I think currently, there's four employees I  
19 believe. So, I mean, look, it's always been a  
20 relatively small company.

21 I think -- like I said, in the early  
22 days, this is probably pre-turn of the century, around  
23 there, there may have been, like, a couple dozen  
24 employees at that time. Since then, it -- yes, it had

1     been quite small.

2                   THE COURT:   Okay.   The other side shows  
3     you listed on, you know, now they're assertedly  
4     privileged documents on a privilege log, talking about  
5     things like graphic designers or fundraising; you  
6     know?   Stuff that doesn't sound too legal.   And so  
7     what's your response to why that doesn't give a hint  
8     that, you know, you were dealing with lots of things,  
9     not just legal advice?

10                  MR. RIZZI:   Sure.   So, you know, I was  
11     frankly puzzled by the graphic designer one.   And I  
12     actually went and looked at that document.  
13     Admittedly, it's not the best description.

14                  Having reviewed the document, I can  
15     share a little more about that.   Obviously without  
16     waiving privilege, but I was not -- and I have no  
17     expertise in graphic design.   I was not recommending a  
18     graphic design.

19                  Their request was actually from  
20     in-house counsel for legal advice with respect to  
21     maintaining confidentiality in connection with hiring  
22     the services of a graphic designer, specifically  
23     relating to services concerning documents that would  
24     have described -- I don't want to say too much here,

1 but the patent enforcement-related issues.

2 So it had nothing to do with  
3 recommending a graphic design. It was all to do with,  
4 you know --

5 THE COURT: Like, whether that person  
6 could be considered, like, an agent, for purposes of,  
7 like, privilege you're talking about?

8 And, look, I'm not trying to force you  
9 to say more than I think you should.

10 MR. RIZZI: I mean, legal advice  
11 concerning, you know, what steps could be taken to  
12 ensure confidentiality with respect to sharing, you  
13 know, arguably sensitive information with this, you  
14 know, outside person.

15 THE COURT: Okay. Let me ask you about  
16 the bucket of, you know -- my sense is, and I don't  
17 have the history that the parties do -- or maybe even  
18 Judge Hall does -- on the case, but my sense is that  
19 over these years, there are going to be some  
20 conversations that Robocast or its representatives  
21 have with folks who might be considered investors  
22 and/or folks who might be considered litigation  
23 funders -- or potential investors or potential  
24 litigation funders. People who one way or the other

1 might give Robocast money relating to its business  
2 and/or litigation.

3 And that sounds like a category that  
4 involves third-party discussions. So, you know, at  
5 least now the internal deliberations about what's  
6 going to happen in those meetings might be privileged,  
7 but certainly the -- you know, what's shared in those  
8 meetings, probably not.

9 And I think as it relates to the  
10 discovery disputes, your side's not taking a view  
11 that, you know, conversations with investors or even  
12 litigation funders are privileged. Maybe that they're  
13 irrelevant, but --

14 And that leads to the question which is  
15 if I glean from the record that it's possible that and  
16 maybe nobody else from Robocast would've been having  
17 conversations about funding of Robocast from  
18 investors, or funding of Robocast for purposes of  
19 litigation, and if it could be argued capably that  
20 those conversations about funding have some bearing on  
21 maybe the value of Robocast's IP, including the IP at  
22 issue in this litigation. One could say maybe that's  
23 information that might bear on damages, maybe  
24 commercial success. And that you might, at least on

1 the Robocast side, have, you know, somewhat unique  
2 access to what happened in those communications and  
3 calls.

4 If I'm the defendant and I'm making  
5 that kind of an argument -- I don't know if they are,  
6 but I think maybe they're making some flavor of it in  
7 their briefing -- why wouldn't that be a path? Where  
8 I'd say why don't -- you know, even as to the other  
9 stuff, if I agree with you, what about, you know,  
10 litigation funding? Investor communications? Et  
11 cetera, as they go to damages and issues like  
12 commercial success.

13 MR. RIZZI: Okay. If I can break that  
14 up into, you know, investors and separately litigation  
15 funders, and address those separately?

16 THE COURT: Sure.

17 MR. RIZZI: Okay. So as to  
18 investors -- first of all, the communications with  
19 investors have been produced. I mean, those are not  
20 being held back. And I have no unique information in  
21 that respect at all.

22 My role with regard to --

23 THE COURT: And can I stop you there  
24 just to confirm? So I think you said this maybe in

1 the briefing for the defendant's discovery dispute,  
2 but Plaintiff's position is when it comes to at least  
3 third-party-related communications with investors, any  
4 responsive materials, whether you agree they were  
5 relevant or not, have been produced from Plaintiff's  
6 side?

7 MR. RIZZI: From Robocast, yeah. Yes.  
8 And again, with the caveat that there was -- two  
9 caveats to that.

10 So right from the get-go, it was  
11 Netflix itself that insisted that email communications  
12 be outside the scope of discovery in this case. We  
13 actually disagreed with that, but ultimately  
14 acquiesced, you know, just based on expediency. So  
15 there was no email collected by either side in this  
16 litigation.

17 I will say Robocast produced a very  
18 large amount of email, but it's email that had been  
19 collected and produced in the prior case.

20 The second caveat is there was also an  
21 agreed cutoff of 2020 for production of responsive  
22 documents. Again, Netflix took the strong position  
23 that because the last-to-expire patent expired in  
24 2020, they were not going to produce documents after

1 that. And again, we acquiesced to sort of 2020 being  
2 a cutoff.

3 So with those two caveats, Robocast  
4 essentially produced, you know -- did a very  
5 comprehensive collection of documents, including all  
6 investor communications that were provided to all  
7 these prospective investors.

8 My role in that respect was very  
9 limited. To the extent that Robocast needed legal  
10 advice, again specifically not on corporate matters,  
11 which I'm not qualified to advise on, but legal advice  
12 concerning the contents of those communications  
13 vis-a-vis patent-related matters, yes. They sought my  
14 legal advice and I may well have provided comments  
15 back.

16 That was the extent of my role with  
17 investor communications. And I believe --

18 THE COURT: And I'm sorry to cut you  
19 off, but -- and again, this is probably not in the  
20 record before me, so again, I can only -- in resolving  
21 this dispute, unless I ask for more information, I can  
22 only take into account the record that's before me.  
23 But I'll just ask because I think it's relevant.

24 The parties must have those documents.

1 They must have seen these investor-related  
2 communications/documents. Do any of them show you as  
3 the only Robocast employee or representative engaging  
4 in communications with investors?

5 MR. RIZZI: No. And again, I was never  
6 an employee. No. No, Your Honor.

7 THE COURT: I just mean, like, if on a  
8 particular communication, there was a Robocast  
9 employee and you, you know -- you know, et cetera.

10 MR. RIZZI: No.

11 THE COURT: Okay. So you're saying no.

12 MR. RIZZI: No, no. And the other --  
13 let me clarify. So the only other role that I may  
14 have played is -- and this was few and far between --  
15 an investor that wanted to do due diligence and had  
16 questions on patent-related -- you know, factual  
17 questions relating to litigation or the patents. You  
18 know, I may have been asked to participate in a  
19 conversation along those lines. But I was not in any  
20 way, shape, or form sort of consistently or routinely  
21 part of those communications, or meetings, with  
22 investors or potential investors.

23 THE COURT: Okay. And litigation  
24 funding?

1 MR. RIZZI: So litigation funding, I  
2 mean, yes. I mean, now that -- we have objections  
3 based on relevance there. Of course in that -- the  
4 litigation funding that's at issue here all, I will  
5 say, post-dates 2020, first of all. So that's, you  
6 know, again, one reason why it's outside the agreed  
7 scope of discovery in this case.

8 If the question is do I have unique  
9 knowledge vis-a-vis communications with litigation  
10 funding? I don't recall an instance where I was on a  
11 call and I think -- I don't know -- I don't think  
12 there were any personal meetings that did not also  
13 include Robocast personnel, including Damon [ph]  
14 and/or Brett and/or Ed Robertiello.

15 Sitting here today, I don't recall that  
16 ever being the case.

17 THE COURT: And this bleeds a little  
18 bit into the next topic, but since it's related.  
19 Maybe separate and apart from motion to quash.

20 Just on lit funding conversations, you  
21 know, if one might plausibly infer that in those  
22 conversations -- again, maybe ones where you're not  
23 the only person there; you know? Other Robocast  
24 representatives, including Robocast employees, were

1 present, too.

2                   You know, one might infer that there's  
3 probably some conversations happening on those calls  
4 with potential funders about how strong are these  
5 patents, including the patents in suit? How valuable  
6 might they be? How, you know -- and I don't know.  
7 Robocast may have been careful not to share too much,  
8 or maybe -- but, you know, what are some, you know,  
9 validity-related changes they might face? You know,  
10 or infringement-related challenges, or et cetera.

11                   But, you know, why wouldn't I  
12 reasonably infer that at a minimum in those kind of  
13 litigation funding conversations, there would be  
14 communications that speak to the value of Robocast's  
15 IP, including the IP in this case, either in terms of  
16 dollars or in terms of the strength of that IP?

17                   MR. RIZZI: Well, I guess my first  
18 response would be to the extent there were any such  
19 conversations, those would be protected by work  
20 product. I can't say there weren't, you know,  
21 generally topics discussed that would touch on, of  
22 course, you know, the patents. The history of  
23 litigation.

24                   I mean, certainly we were careful not

1 to disclose attorney-client information, but anything  
2 that was discussed, we believe is protected by work  
3 product.

4 THE COURT: Including discussed and  
5 shared with a third party potential litigation funder?

6 MR. RIZZI: Yes, yes. And --

7 THE COURT: How would the sharing of  
8 the information with the litigation funder not obviate  
9 any privilege or work product protection assert?

10 MR. RIZZI: There is case law,  
11 including a decision that my colleague was -- and  
12 is -- prepared to address from Judge Hall -- that  
13 conversations with litigation funders are protected by  
14 work product. Because the common interests -- and of  
15 course --

16 THE COURT: You're talking about the  
17 common interest privilege?

18 MR. RIZZI: Yes, yes. Because these  
19 were all done, of course, an overarching  
20 confidentiality agreement that recognizes that common  
21 interest.

22 THE COURT: Okay. And I understand  
23 that other counsel, because it relates to the  
24 discovery dispute, may have -- may be also prepared to

1 talk about this in more detail.

2 Okay. I think for now, I'll just try  
3 to keep it focused. Those are the main questions I  
4 had for you. Was there anything more you want to add  
5 before I turn to your colleague on the other side?

6 MR. RIZZI: No. I mean, we didn't  
7 really talk about patent prosecution, but you know, I  
8 think that the record is clear.

9 Back when I was still at Wyogotschell  
10 [ph] -- '96, '97 timeframe -- Wyogotschell [ph] had  
11 exited the patent prosecution business. I did refer  
12 Robocast and Mr. Torres to a former colleague, Jo  
13 Sofer. He and his firm had been prosecution counsel  
14 ever since. There really is no serious dispute about  
15 that, and that I have not prosecuted any of the  
16 patents.

17 And in fact, since 2011 or so, after  
18 the cases were filed against Microsoft and Apple, and  
19 prosecution bars were put in effect, I was, you know,  
20 legally -- I was court ordered, precluded, from being  
21 involved in patent prosecution. And that bar in fact  
22 remained in place through issuance of the continuation  
23 patent.

24 As you may recall, cases against

1 Microsoft and Apple involved the parent patent. While  
2 those cases were pending, the continuations were being  
3 prosecuted by the Sofer & Haroun firm. And the  
4 prosecution bars relating to those cases endured until  
5 those patents actually issued.

6 And I will say, I know it's not in the  
7 record, but there's no testimony from prosecution  
8 counsel, from Robocast counsel, that suggests  
9 otherwise.

10 THE COURT: I can't recall, but was  
11 prosecution counsel deposed --

12 MR. RIZZI: Yes.

13 THE COURT: -- in the case?

14 MR. RIZZI: Yes. Both lawyers who were  
15 involved in prosecuting were deposed for I believe  
16 four days, or three and a half days.

17 THE COURT: Okay. All right. Let me  
18 keep it moving. Let me turn to -- I'll give you a  
19 chance for a brief rebuttal.

20 Let me turn to Defendant's counsel.  
21 Who's going to be speaking on behalf of Defendants  
22 here?

23 MS. ELLIOTT: Good morning, Your Honor.  
24 Tara Elliott with Latham & Watkins on behalf of

1 Defendant Netflix.

2 Are you able to hear me?

3 THE COURT: Yes, I can see you,  
4 Ms. Elliott, and hear you.

5 MS. ELLIOTT: Okay.

6 THE COURT: Great. All right. Let's  
7 jump in and maybe start in the same place I did with  
8 Mr. Rizzi.

9 It looked to me like in the briefing,  
10 the focus -- you know, there are various requests in  
11 the subpoenas at issue, but, you know, on some level,  
12 parties have to focus them on, like, what categories  
13 of information are we seeking here really? And what  
14 are the arguments as they relate to the -- you know,  
15 either the Friedman factors or the equivalent that our  
16 court has used as to why it is that, you know,  
17 discovery should be sought from Mr. Rizzi, you know,  
18 as to these topics.

19 And I thought I -- I was seeing a  
20 breakdown and it may be four rough areas. Again, you  
21 know, prosecution-related information, Mr. Rizzi's own  
22 investment, information about communications regarding  
23 investing in Robocast or in litigation funding, and  
24 then patent licensing.

1                   Would you tweak or alter what you think  
2                   this motion's really about in terms of the kinds of  
3                   buckets of information that are at issue?

4                   MS. ELLIOTT: Thank you, Your Honor. I  
5                   think Your Honor has captured four of I would say five  
6                   buckets. So I'd tweak it slightly.

7                   We'd concur that Mr. Rizzi's personal  
8                   investment is one category. We concur that the  
9                   licensing activity of Robocast, beyond the parties  
10                  from whom they already have license agreements, is  
11                  fair game. We think the communications to investors,  
12                  which Mr. Rizzi was an integral part of those  
13                  communications, is yet another category. We concur  
14                  with Your Honor that prosecution is also a valid  
15                  category.

16                  The fifth and new one that I would add,  
17                  Your Honor, is the inequitable conduct allegations at  
18                  issue in this case. There was at least one motion to  
19                  quash in the previous litigation with respect to -- in  
20                  the Microsoft case. I believe the plaintiff and  
21                  counsel for RatnerPrestia moved to quash the  
22                  subpoenaed RatnerPrestia.

23                  This case is cited in the papers, but I  
24                  want to note it just in support of this fifth topic.

1 Because Judge Andrews, in denying that motion to  
2 quash, made a very important observation. And for the  
3 record, this is -- excuse me. It's 2013 West Law  
4 1498666.

5 And in that decision where he denied  
6 counsel's motion to quash a subpoenaed RatnerPrestia,  
7 not only did the court hear, consider, and dismiss the  
8 privilege concerns. Not only did the court hear,  
9 consider, and dismiss the burden concerns, he made the  
10 following observation, which I think is relevant here.

11 A review of the deposition topics and  
12 the document requests certainly calls into question  
13 Microsoft's representation that only non-privileged  
14 information is sought.

15 Microsoft also represents that it  
16 expects the documents the subpoena is calling for less  
17 than 100 documents. And that the deposition would  
18 last two hours.

19 The court is mindful that inequitable  
20 conduct allegations are in the case. That is that  
21 Mr. Torres was dishonest with the PTO, and further  
22 understands Microsoft to be generally alleging in so  
23 many words that Mr. Torres is an unreliable witness.  
24 This is all to say the factual, non-privileged

1 information from a witness, whose reliability is not  
2 reasonably subject to dispute, could be very relevant.

3 Here in this case, one of Microsoft's  
4 defenses is inequitable conduct. And those issues  
5 remain at stent. They were covered in depositions in  
6 this case as they were in earlier cases. And  
7 Mr. Rizzi's role is quite relevant there because, as  
8 the attorney primarily responsible for the litigations  
9 then and now, had an obligation to report to the  
10 patent office what Judge Andrews found in that earlier  
11 case.

12 So I would just add that fifth topic,  
13 inequitable conduct, to the previous four as sort of  
14 the five buckets that we think are relevant here.

15 And if I may respond -- I'm sorry. Go  
16 ahead, Your Honor.

17 THE COURT: I just have something to  
18 ask.

19 MS. ELLIOTT: Sure.

20 THE COURT: I thought I had understood  
21 prosecution to be relevant -- asserted to be relevant.  
22 That the bucket of prosecution asserted to be relevant  
23 because it was going to speak to inequitable conduct.  
24 But it sounds like you're breaking those up.

1                   What is it about prosecution-related  
2       discussions Mr. Rizzi may have had with Mr. Sofer or  
3       others that are relevant to something other than  
4       inequitable conduct issues?

5                   MS. ELLIOTT: Fair question, Your  
6       Honor. Well, the recent defense that we've added from  
7       Netflix's prosecution laches, so there are two  
8       additional patents at issue in this case. And those  
9       patents issued later.

10                  And it's actually evidenced in the  
11       record, not before Your Honor yet, because as Your  
12       Honor observed, there has been a fair amount of  
13       discovery that's taken place since the papers on this  
14       particular motion have been submitted.

15                  And among the discovery -- late  
16       discovery produced by Robocast, as well as deposition  
17       testimony, it's become clear that Mr. Rizzi also  
18       provided information and communications to investors  
19       with respect to their strategy on the prosecution of  
20       the later two patents, which goes to Netflix's  
21       prosecution laches defense. And that's why I separate  
22       the two, Your Honor.

23                  You know, inequitable conduct was in  
24       the previous litigation as well. It's in our case as

1 a defense, and prosecution laches is yet another  
2 indifference defense that's in this case. And  
3 Mr. Rizzi has been communicating with third parties,  
4 not under the umbrella of privilege, about these very  
5 topics. At least with respect to the prosecution  
6 laches.

7 With respect to inequitable conduct,  
8 one of our concerns is how they have promoted the  
9 value of the IP asserted here without communicating on  
10 the misrepresentation from Mr. Torres in earlier  
11 litigation that would be relevant to value.

12 So those two issues we see are  
13 distinct, but I do hear Your Honor's point, that they  
14 may have been grouped under the prosecution bucket.

15 THE COURT: When you mention non-  
16 inequitable-conduct-related prosecution matters, you  
17 talked about laches. But when you described what  
18 information the case might bear on that, it sounded  
19 like you're talking about Mr. Rizzi's conversations  
20 with investors, which is a separate bucket. You know,  
21 what did he say to third-party investors on behalf of  
22 the plaintiff.

23 MS. ELLIOTT: Yes.

24 THE COURT: Like, it's fair, like, it

1 could be considered part of that bucket?

2 MS. ELLIOTT: There are a lot of  
3 overlaps here for sure, Your Honor. And I think  
4 there's certainly -- I used that as an example of  
5 where he was communicating around it, but I think the  
6 topic of prosecution laches independently is one for  
7 exploration where privilege can't be claimed and would  
8 not be appropriately claimed because Mr. Rizzi's role  
9 in communicating with prosecution counsel.

10 He mentioned the two attorneys who were  
11 deposed in this case. The record will show -- and I  
12 say "will show" because, Your Honor, I acknowledged in  
13 response to your earlier question of Mr. Rizzi, there  
14 is a fair amount of information that bolsters and  
15 underscores the relevance of Mr. Rizzi's unique  
16 testimony. All of that -- much of that came after the  
17 submission of the papers.

18 And certainly, we were very  
19 conscientious whether to add on to the court's papers  
20 or whether to wait to see if we had lead to do so, and  
21 to discuss these matters with the court. We are  
22 prepared to supplement as the court may find useful or  
23 helpful here, but we have prepared supplements with  
24 citations to the records so Your Honor can see a

1 number of the questions the court has asked just this  
2 morning already.

3           There is precise answers in the record  
4 showing that, in fact, Robocast did not provide the  
5 testimony that would have potentially narrowed the  
6 scope of our subpoena.

7           In many instances, Robocast blocked  
8 discovery from Robocast witnesses where it could've  
9 otherwise narrowed the discovery we were seeking from  
10 Mr. Rizzi.

11           And in fact, you will hear I think in a  
12 few moments, Your Honor, from my co-counsel here -- my  
13 colleagues here -- on a number of the privilege  
14 disputes that also sort of intertwine with this very  
15 issue.

16           You'll see, Your Honor, that they're  
17 claiming work product and privilege on issues and  
18 topics that have not -- that can't be supported. And  
19 in some instances, they removed or called back their  
20 claim of privilege. I don't want to get into too much  
21 detail because I know that's going to be covered  
22 separately, but it does relate to this particular  
23 issue.

24           And the reason it relates to this issue

1 is because Mr. Rizzi wanted us to get discovery from  
2 Robocast and its witnesses first. And we've been  
3 told, Judge, to bring in in the transfer hearing in  
4 front of the Southern District of New York, that we  
5 were willing to consider staging Mr. Rizzi's subpoena  
6 such that we would seek the discovery from Robocast,  
7 and see what remained after that. And Mr. Rizzi did  
8 not take us up on that offer. Instead, he stood firm  
9 and commanded our withdrawal of the subpoena.

10 Well, now just by the passage of time,  
11 we find ourselves having concluded all of the fact  
12 discovery of this case. Having concluded our  
13 depositions of Robocast witnesses. And upon  
14 concluding that discovery -- that fact discovery -- it  
15 is absolutely clear that they have not produced many  
16 of the topics that bear on all five of these buckets.

17 I want to be clear on one point in  
18 particular, Mr. Rizzi said earlier in his remarks that  
19 he did not -- that Netflix did not seek discovery from  
20 any other investor, and he thought that was curious.  
21 Well, that's actually not true. We actually sought  
22 discovery from Chris Dykstra, who's a big investor,  
23 and from the entity Warecorp. And Netflix faced a  
24 significant amount of obstruction and blocking of that

1 deposition and of questions sought in that deposition.

2 Further, Your Honor, we have subpoenaed  
3 Ms. -- I apologize, Your Honor. I see you want a  
4 break through --

5 THE COURT: Yes. I've got to try to be  
6 focused here. And so, you know --

7 MS. ELLIOTT: Sure.

8 THE COURT: -- I'm hoping both sides  
9 will give me kind of focused answers to my number of  
10 questions.

11 MS. ELLIOTT: Yes.

12 THE COURT: It just strikes me that --  
13 so the briefing was completed in, like, March or  
14 April.

15 MS. ELLIOTT: Yes.

16 THE COURT: It strikes me that as to  
17 these buckets, like, each side -- what happened in  
18 discovery here, which is largely completed -- fact  
19 discovery it seems like -- it seems like it could be  
20 very relevant to the outcome of the motion.

21 Like, for example, the plaintiff's side  
22 might point to -- might say, "Look, as to bucket  
23 number one, they're claiming that they need discovery  
24 from Mr. Rizzi. But look at all the discovery they

1 took on this subject matter from Robocast employees or  
2 Robocast affiliated people, or look at the opportunity  
3 they had to do that and look how they just gave it  
4 up."

5 And on the flipside, Defendant might --  
6 it seems like -- might argue or might be able to  
7 argue, "Look at how we can show, by way of discovery  
8 we did take, people talking about how, well, only  
9 Mr. Rizzi was in those conversations about X." Or,  
10 "Look how we tried to get this discovery from other  
11 people, but were shot down."

12 It all seems like what's happened  
13 between the end of briefing and now, as to the various  
14 of these factors, could be kind of important, but I  
15 don't have that in the record before me.

16 Is that right? And if so, like, how  
17 could I credibly make a decision on the issue without  
18 at least -- and I'm -- to it because there's so much  
19 record, but to allow the plaintiff's at least to make  
20 a brief additional supplement about these topics. Do  
21 you disagree?

22 MS. ELLIOTT: I understand your point,  
23 Your Honor, and I'll make three reactions.

24 First is Your Honor set forth some

1 observations in your remarks at the beginning of the  
2 hearing about the role of outside counsel and the role  
3 of in-house counsel, and how in small entities, that  
4 can be somewhat merged. And we absolutely concur with  
5 Your Honor's observation of what happened here.

6 And we submit that the papers that were  
7 submitted, that are in front of Your Honor, fully  
8 support this discovery with respect to Mr. Rizzi in so  
9 far as we've made a showing of his unique role, his  
10 unique knowledge.

11 And even in this hearing, Your Honor,  
12 Mr. Rizzi just made a number of representations -- I  
13 started to write them all down -- that we should be  
14 able to test in discovery. There are actual  
15 representations and averments of what he did or did  
16 not do, and roles he did and did not play that are  
17 relevant here. And we have documents that would  
18 challenge the veracity of those things. So that's  
19 point one.

20 Point two, Your Honor, in response to  
21 your query, absolutely there's things that have taken  
22 place since the papers were submitted. And we've  
23 actually prepared with documentation that can be  
24 submitted right now to show Your Honor the support for

1 our position, that it's only been bolstered. And we  
2 accept that Your Honor doesn't have it and it makes it  
3 difficult for you to rule on the supplemental record.

4 We do, you know, submit that that  
5 record that is before Your Honor does demonstrate  
6 that -- and this conversation, frankly -- that the  
7 representations made by counsel certainly underscore  
8 the propriety of this deposition. But we certainly  
9 don't object to -- and prepared, in fact -- to submit  
10 to Your Honor supplements that would show the points  
11 that we are making in our papers. And they've only  
12 gotten stronger through discovery.

13 And the third point I'll make, Your  
14 Honor, is that what is in front of the court and is  
15 scheduled to be heard in this proceeding are the  
16 actual efforts to block discovery on the topics that  
17 are laid out in that subpoena to Mr. Rizzi.

18 And so even if the court doesn't have  
19 the deposition transcripts, which we have ready and  
20 available to show Your Honor, even if the court  
21 doesn't have the citations to the documents that  
22 haven't been produced yet, we have those ready to  
23 submit to Your Honor.

24 You do have in front of you the

1 privilege log issues that show that Robocast has  
2 systemically tried to shield facts -- facts in this  
3 case. Not privileged communications, but facts from  
4 us in discovery.

5 Here we find ourselves in the middle of  
6 expert discovery and simply do not have the things  
7 that Mr. Rizzi represented have been produced. And  
8 there's a very robust record of discovery dispute  
9 communications where we are consistently and  
10 persistently trying to get them to produce information  
11 that they were ordered to by Judge Hall on April 5th,  
12 and that we've requested of them, and that they have  
13 made representations to the court that they've already  
14 produced. And there's a really fulsome record to show  
15 they haven't been produced.

16 THE COURT: Okay. Let me just --  
17 because I'm running out of time on this motion. Let  
18 me ask just a couple quick-hitters about a couple of  
19 buckets.

20 One is about Mr. Rizzi's personal  
21 investment in Plaintiff. It's asserted by the other  
22 side, look, that's less than one percent of all  
23 investment. There's tons of other investors. His  
24 investment ended, you know, 14 years ago. The idea

1 that Mr. Rizzi would have, like, particularly unique  
2 knowledge about why people might invest in Plaintiff  
3 or the factors that related to Plaintiff's valuation  
4 from an investment perspective, it doesn't make any  
5 sense.

6 Any response to that?

7 MS. ELLIOTT: Yes, Your Honor. There  
8 was over a 30-year period -- Mr. Rizzi has been  
9 counseling Robocast since the mid-'90s. So over --  
10 almost a 30-year period, there's been about 45 to \$50  
11 million raised by Robocast from over 120 investors,  
12 according to the testimony. Of those investors, Your  
13 Honor, only Mr. Rizzi has been paid. At least that is  
14 what the testimony that's been given under oath in the  
15 record here. And that was testimony provided by  
16 Mr. Brett Smith, who is the in-house counsel.

17 But when I asked Mr. Torres in  
18 deposition, and I asked others in deposition, "Who has  
19 had a return on their investment or have been paid out  
20 of the proceeds of their licensing activity?" They  
21 said none have. But with Mr. Rizzi noted by Mr. Brett  
22 Smith as an exception.

23 Mr. Rizzi has been integral and  
24 involved in every aspect of this business decision as

1 it relates to their patent enforcement, and that makes  
2 him unique. A unique investor. And his reasoning for  
3 investing during a period when they claim that they  
4 were commercially successful, yet they were  
5 struggling. And Mr. Torres called that investment  
6 significant. He called it a lifeline. That was sworn  
7 testimony. And that makes Mr. Rizzi's investment  
8 quite unique in the context of the much broader role  
9 he played as a business advisor.

10 THE COURT: And I guess my  
11 understanding though about why investments and why  
12 people invested are said to be relevant to the issues  
13 in the case is that they might speak in some way to  
14 damages issues or commercial success issues. But I'm  
15 not sure why -- and I don't know that it's in the  
16 record that he's the only investor who was paid or  
17 repaid -- the only one -- but whether he was or  
18 wasn't, isn't the gist of why investment is supposed  
19 to be relevant because it's like, well, what -- why  
20 did you decide to invest? What about their IP, you  
21 know, seemed valuable? You know, what amount of money  
22 was invested? You know, how successful the company --  
23 aren't those the things that go to relevance?

24 MS. ELLIOTT: Absolutely, Your Honor.

1 It's the value of the IP. It's what a reasonable  
2 person in a hypothetical negotiation would've deemed  
3 appropriate as a licensing fee. All of these things  
4 are relevant to the ultimate value and to potential  
5 damages.

6 And in this particular case, you have a  
7 pretty robust record here of Robocast telling  
8 potential investors, investors, and litigation funders  
9 one thing. When in fact, the record here says  
10 something very different.

11 At the same time that they're claiming  
12 commercial success, they're saying that they needed a  
13 lifeline. This is Mr. Torres' deposition testimony.  
14 And that Mr. Rizzi provided that lifeline.

15 Well, it's actually Mr. Rizzi who's in  
16 investor meetings. He's representing himself and has  
17 been represented in Robocast communications and to  
18 investors as a key member of the executive team. Key  
19 member of the executive team.

20 They promoted Mr. Rizzi's investment.  
21 It was promoted to third parties, to outsiders, to  
22 bolster the value. They promoted his resume, his role  
23 in the legal industry, and then promoted his personal  
24 investment as well as his business advisement role in

1 the company. That's all relevant to the damages and  
2 to the value of the company, and what a reasonable  
3 party would've been done in a hypothetical  
4 negotiation, in addition to the invalidity issues of  
5 commercial success.

6 THE COURT: Can I just ask about  
7 commercial success?

8 MS. ELLIOTT: Yes.

9 THE COURT: And there's talk about  
10 products. Did Plaintiff make any products or is the  
11 success -- the commercial success -- is that, like, a  
12 proxy for our success in raising money in support of  
13 patent litigation with regard to this IP?

14 MS. ELLIOTT: Your Honor just asked the  
15 very questions I asked of Robocast witnesses. And  
16 it's interesting and relevant that Robocast marketed  
17 themselves to third parties -- funders that they were  
18 commercially successful. And when asked why, they  
19 talked about products, and they also talked about  
20 their licensing revenue as garnered from the Apple and  
21 Microsoft litigations, and one particular third  
22 license that was outside litigation.

23 But when you asked -- when I asked  
24 Mr. Torres about their products, they admitted -- he

1 admitted -- that they have not had a sale or revenue  
2 generated from the products that they have marketed.

3 So again, this goes to the value of the  
4 company, the credibility of the witnesses, the -- what  
5 a hypothetical negotiation would've yielded from two  
6 informed parties. All of these representations, many  
7 of which are in stark contrast to each other, are  
8 relevant to our defenses and are worth of exploration  
9 in discovery.

10 THE COURT: Okay. And again, quickly,  
11 on patent licensing, lots of outside counsel who  
12 represent parties in litigation -- patent  
13 litigation -- have participated in discussions with  
14 potential licensees with regard to those patents.

15 If we were having subpoenas of  
16 attorneys who were attorneys in a federal patent case,  
17 every time they participated in patent licensing  
18 discussions either with the defendant in that case or  
19 in other cases that may or may not have been filed,  
20 we'd have a lot of attorney depositions.

21 How could patent licensing be the kind  
22 of, like, you know, relevant attorney-only information  
23 that would kind of justify this kind of subpoena?

24 MS. ELLIOTT: Yes, Your Honor. The

1 Robocast witnesses were asked about their licensing  
2 efforts to others. They were obviously -- not  
3 obviously, but they were promoted. The record shows  
4 they were promoted to investors as how the investors  
5 would get a return on their investment.

6 But when we asked, for example,  
7 Mr. Smith in deposition about those outreaches, he  
8 pointed to Mr. Rizzi.

9 Other witnesses could not provide any  
10 factual testimony as to who was sought a license, who  
11 they sought a license from, whether they responded,  
12 how they responded, whether or not they had an  
13 invalidity defense that was communicated to them. All  
14 those things are discoverable. It should've been part  
15 of the record. They've been requested since last  
16 April. Have not been produced.

17 And when we asked about them, we got  
18 some vague recollections of one or two parties who  
19 were on the receiving end of these outreaches. And  
20 when I asked the question in deposition, "What did  
21 they say in response?" the witnesses from Robocast  
22 pointed back to Mr. Rizzi. And particularly said,  
23 presumably, Mr. Rizzi knows. Everyone pointed back to  
24 Mr. Rizzi.

1 THE COURT: I'm sorry to jump in --

2 MS. ELLIOTT: Sure.

3 THE COURT: -- but I think what you're  
4 saying is you've gotten some discovery which probably  
5 is not before me, which people are essentially saying,  
6 "Well, the only person affiliated with Robocast who  
7 would know what was said from our end in these  
8 licensing conversations is Mr. Rizzi"; is that right?

9 MS. ELLIOTT: Correct. He's --

10 THE COURT: But I guess just generally,  
11 thinking about this longer-term, like, it's got to be  
12 the case; right? That, like, a firm's hired to  
13 represent a plaintiff. There are ten potential  
14 litigation targets. You know, maybe they sue one, but  
15 then they're talking with nine others about licensing.

16 It's probably the case that, you know,  
17 in a lot of -- not every case. Sometimes you're,  
18 like, separate licensing counsel, but, you know,  
19 there's probably a lot of cases where the same firm  
20 who's representing them in the litigation in the one  
21 is also, like, sending a demand letter and having  
22 calls with, you know, third-party X and the other  
23 nine.

24 MS. ELLIOTT: Yes.

1 THE COURT: And if all those -- in all  
2 those kinds of cases, if you were always deposing the  
3 lead lawyer, in the one, you know, you'd have a lot of  
4 depositions with attorneys. And I'm just wondering  
5 why is this any different?

6 MS. ELLIOTT: Yes, Your Honor. So I  
7 would say two things in response. First, I don't  
8 think this case requires us to -- Your Honor to make a  
9 rule that goes broader.

10 This case is not just about the  
11 licenses. This particular effort to depose Mr. Rizzi  
12 is so much broader than the licenses, that this is not  
13 a precedent sort of case that would I think create a  
14 concern about opening the floodgates of depositions  
15 against -- of attorneys who handle licensing roles.  
16 Moreover --

17 THE COURT: And, Ms. Elliott, is part  
18 of what you're --

19 MS. ELLIOTT: -- I think it's --

20 THE COURT: I'm sorry to interrupt you  
21 again. Is part of what you're saying there that  
22 patent licensing -- it's a bucket, but it may not be  
23 the most important bucket for us?

24 MS. ELLIOTT: Correct, Your Honor. And

1 I think importantly, and I'll be brief here in making  
2 this important point, they have not produced that  
3 correspondence. And most of those cases where you do  
4 have litigation counsel who may be corresponding about  
5 licensing efforts, it's in the record. And our  
6 damages experts can consider that correspondence.  
7 They can look at what the party who sought a license  
8 said in response, whether they had a noninfringement  
9 position or an invalidity position. It's relevant  
10 here.

11 We don't have those records. They  
12 refused to provide them. In many cases, they say they  
13 don't have them anymore.

14 So that creates a unique issue for us  
15 in this case, that's only one of the five buckets that  
16 we've identified that make Mr. Rizzi's deposition very  
17 unique and relevant here. Because there were no  
18 boundaries set here.

19 Mr. Rizzi is all over the record on  
20 business issues and legal issues alike. And his role  
21 is unique because everybody keeps pointing back to  
22 Mr. Rizzi.

23 THE COURT: Okay. And then last  
24 question which relates to the category of

1 communications relating to investments and litigation  
2 funding, I know I may talk about this a little bit  
3 more with regard to the next dispute, but -- and I  
4 guess this also probably goes to, like, what's in the  
5 record or not. But it's asserted by the plaintiff  
6 that when it comes to communications regarding  
7 investors, that that discovery has been provided.

8 So that, like, we know from a document  
9 perspective what kind of communications there were  
10 with investors.

11 So presumably, we could see, like, is  
12 Mr. Rizzi the only person making these communications  
13 or are there lots of Robocast employees who are part  
14 of those communications? How unique is his knowledge?  
15 What would that record tell me, and then what else  
16 would you say with regard to, you know, what I might  
17 or might not infer from whatever record we have about  
18 the issue of communications regarding litigation  
19 funding.

20 MS. ELLIOTT: Yes. Thank you, Your  
21 Honor, for the opportunity to address that, because  
22 there were representations made earlier that are not  
23 accurate.

24 What we have gotten from the -- at

1 least one third-party deposition of Ms. Christine  
2 Ianuzzi in particular, she was a former employee of  
3 Robocast and we had to subpoena her records. And that  
4 subpoena and those depositions, frankly, Your Honor,  
5 and I hate to layer on your suggestion of supplemental  
6 briefing, but I think you would see -- if you saw that  
7 deposition and the correspondence following, that it  
8 became abundantly clear that Robocast did not produce  
9 all of the relevant communications to investors about  
10 these very patents and about their licensing plans and  
11 representations that are clearly at issue in this  
12 case.

13 In fact, we got a plethora of unique  
14 information from Ms. Ianuzzi in her document  
15 production, and we have since followed up numerous  
16 times with Robocast asking for those productions. And  
17 it turns out they did not produce information in the  
18 data room. They did not produce all the webinars  
19 where they communicated with investors. And Mr. Rizzi  
20 was, himself, a presenter, and marketed as a key  
21 executive of the team in these webinars with  
22 investors.

23 So there's a whole series of things,  
24 and I don't want to be longwinded here. I know Your

1 Honor's time limited, but this issue in particular is  
2 a real problem here based on the representations from  
3 counsel. What hasn't been produced, and what they've  
4 admitted in meet and confers that were transcribed, as  
5 well as in the correspondence of discovery disputes  
6 that they have not produced.

7 So it's just simply not true, their  
8 earlier representation that they've produced  
9 everything. This is something that counsel for  
10 Robocast has said in past hearings with Judge Hall  
11 that turned out to not be true. And there's  
12 well-documented discovery communications laying that  
13 out.

14 THE COURT: Okay. And, Ms. Elliott, I  
15 do need to try to move on, but is there anything  
16 further that you want to add before I turn back to  
17 Mr. Rizzi for a brief rebuttal, and then try to move  
18 on to our next dispute?

19 MS. ELLIOTT: Just briefly, Your Honor.  
20 Mr. Rizzi has not once said he does not have relevant  
21 documents, or that he does not have unique documents.  
22 That's never been a response to any of these efforts  
23 to seek his testimony and his documents.

24 Second, Your Honor, Mr. Rizzi refused

1 to meet and confer such that we could try to narrow  
2 the information that we've sought to subpoena. We  
3 have walked through every one of the topics in the  
4 subpoena and compared it to the information we  
5 actually got in depositions and in documents, and have  
6 noted for every category where we still have missing  
7 information.

8 So I would just conclude, Your Honor,  
9 by saying that this is not the usual case of seeking  
10 deposition from lead counsel. This is a case where  
11 lead counsel has very much acted as an in-house lawyer  
12 from an outside firm, and has blended his role in such  
13 a way that it's nearly indistinguishable. And he does  
14 have facts that are not privileged, which we've  
15 otherwise been blocked from getting, and we're seeking  
16 his testimony for those non-privileged facts.

17 THE COURT: Okay. Thank you,  
18 Ms. Elliott.

19 Mr. Rizzi, I'll give you a brief chance  
20 for rebuttal, if there are particular statements that  
21 Ms. Elliott made that you want to touch on before I  
22 move on to our next motion.

23 Oh, and you're on mute. Okay. Happens  
24 ever hearing.

1 MR. RIZZI: Thank you, Your Honor. I  
2 appreciate the opportunity for a brief rebuttal.

3 I will say just categorically, nothing  
4 you heard today from Ms. Elliott in any way changes  
5 the position I or Robocast took from the get-go.  
6 Subpoena's facially improper. There's all these  
7 accusations of misrepresentations that were made,  
8 which I really take offense to.

9 What you didn't hear her dispute is two  
10 critical facts that I mentioned earlier about  
11 limitations that Netflix imposed on the scope of  
12 discovery. One, nothing after 2020. Two, no emails.  
13 So she shouldn't be hurried to say, "We're missing all  
14 this stuff," when it was their own restrictions that  
15 likely led to much of what they're seeking to be not  
16 captured. Including, for example, things like  
17 communications with potentially licensing targets.

18 And, by the way, they do have all of  
19 the letters that were sent out I believe during the  
20 prior litigation. Those have been produced. They  
21 have every license agreement that was actually entered  
22 into. And they also had the opportunity to question  
23 Mr. Smith, the in-house counsel who was involved in  
24 every discussion on all those topics. So there's

1 nothing unique from me that they have a basis to seek.

2 In terms of -- she mentioned  
3 Ms. Ianuzzi. Well, that was frankly an improper --  
4 around their own restriction prohibition on email  
5 discovery. They subpoenaed a third party who we  
6 didn't represent. And from her, they got email  
7 communications with Robocast that they themselves said  
8 were off limits in the case.

9 So they shouldn't be heard -- rely on  
10 any discovery they got from Ms. Ianuzzi. Not that it  
11 changes anything substantively, but they shouldn't be  
12 heard for profit from a restriction on discovery that  
13 they themselves imposed.

14 In terms of -- she mentioned Ratner &  
15 Prestia. Ratner & Prestia was the patent prosecution  
16 firm that originally was retained by Robocast to  
17 represent them in prosecution. So it was no surprise  
18 that subpoena to them was allowed.

19 In terms of the -- oh, just to clarify  
20 the investment. So I was divested in 2010, prior to  
21 initiating the Microsoft and Apple litigations. I  
22 don't have all the details in front of me, but I  
23 understand, that divestment involved converted  
24 whatever equity interest I had into a loan. So it was

1 the loan that was repaid after conclusion of those  
2 cases, not -- it was not a return on any investment,  
3 just to clarify that.

4 And again, you didn't hear anything  
5 from Ms. Elliott that explains why my personal  
6 reasons, even to the extent that I could recall them  
7 at this time for investing, have any relevance to any  
8 issue in this case.

9 In terms of commercial success,  
10 Robocast is not asserting commercial success for  
11 anything post-2001. So that's not an issue.

12 There's absolutely --

13 THE COURT: So in terms of objective  
14 indicia, commercial success is not being raised?

15 MR. RIZZI: Not -- only for the very  
16 early work done by Robocast where it did have products  
17 and it was generating revenue from those services.  
18 Not --

19 THE COURT: What time period is that?

20 MR. RIZZI: 2000, 2001. My investment  
21 was in 2008.

22 And in terms of my role, communicating  
23 to investors, there's nothing unique there. We  
24 actually produced -- even though there was another

1 agreed restriction on discovery, was no videos. And  
2 again, at Netflix's insistence. Nonetheless, we  
3 produced the video which, as I recall, is the only  
4 record and the only webinar that I have any  
5 recollection of participating in, where I was one of  
6 multiple presenters simply reporting on facts  
7 concerning the litigations and the continuation  
8 patents.

9           The notion that discovery from me is  
10 relevant to inequitable conduct is refuted by their  
11 own pleading. And they have no basis, and they cannot  
12 allege that I am an actor in terms of any inequitable  
13 conduct allegations.

14           And similarly with prosecution laches.  
15 Prosecution laches is based on unreasonable,  
16 inexcusable delay in pursuing patents. There's  
17 nothing I have that's relevant to that. You know,  
18 much less unique to my -- and their own prejudice. So  
19 you didn't hear any reasonable connection to unique  
20 knowledge of mine to their prosecution laches defense.

21           And on the last point, yes, we agree  
22 that there is relevant testimony that has supplemented  
23 the record. You know, well, not yet, but I would  
24 submit that if they truly believe that that moved the

1 needle, you would've seen from them, you know, just  
2 based on past history, a request to supplement that  
3 record.

4 You didn't see that. We're happy to  
5 submit, you know, excerpts from depositions that we  
6 think support our position.

7 I will say, I don't think that's  
8 necessary. I think Your Honor, you know, really has  
9 enough information to now grant the motion. This has  
10 been a cloud hanging over Robocast for months now, and  
11 it should not continue to be a distraction.

12 THE COURT: But, Mr. Rizzi, wasn't one  
13 of the points in your memos that, like, it was kind of  
14 premature --

15 MR. RIZZI: Yes.

16 THE COURT: -- for the other side to  
17 submit these subpoenas to you because all this  
18 discovery was still pending, and they were going to  
19 get depositions from folks like Mr. Torres and all the  
20 other folks. And that was going to cover a lot of the  
21 ground that might otherwise, you know, be said that  
22 you might have some knowledge about.

23 Weren't you making that point in your  
24 brief?

1 MR. RIZZI: I did. I did. And I stand  
2 by that. And cover or -- or gave them the opportunity  
3 to cover. In many cases, they chose to put their head  
4 in the sand, really because I think the motive was to  
5 continue to pursue this -- you know, this baseless  
6 subpoena against me.

7 But yes, and if Your Honor's of the  
8 view that you require supplementing the record for  
9 that, we're happy to do that. I would just, again,  
10 reiterate that -- a point I didn't make before, but  
11 the Shelton test, if anything, is more restrictive  
12 than the Friedman test. And the factor under Shelton  
13 is cruciality of the testimony.

14 Nothing you heard from Ms. Elliott even  
15 comes close to rising to the level of anything being  
16 crucial in terms of unique knowledge.

17 Now again, that isn't privileged. I  
18 mean, of course I have vast unique knowledge of their  
19 litigation strategy, of litigation -- I mean, and  
20 that's really what this is about because there's  
21 nothing else unique about my knowledgebase that  
22 doesn't cross the line into privileged information.

23 THE COURT: Okay. All right. Thank  
24 you.

1 Thanks to you both, counsel.

2 I think what I, unfortunately, have --  
3 I need to do to be, like, appropriately rigorous, is  
4 allow one further brief submission. I say that  
5 because it does strike me that multiple of the key  
6 factors that I'm supposed to assess when it comes to  
7 subpoenas to trial counsel under the Shelton test or  
8 the Friedman test -- any relevant test that any court  
9 would use -- has to do on the one hand, maybe from  
10 Plaintiff's perspective, with, you know, the extent to  
11 which any testimony or discovery sought from counsel  
12 is not really unique to counsel vis-a-vis the  
13 plaintiff. But can be sought or has been sought from  
14 other Plaintiff's representatives or other parties in  
15 the case. Indeed the plaintiff made that argument in  
16 the brief.

17 And on Defendant's side, you know, as  
18 it relates to the cumulativeness or uniqueness issue,  
19 Defendant's could assert that they sought discovery on  
20 topic X, but witness has said, "I don't know. The  
21 only person who knows is Mr. Rizzi." Or that  
22 otherwise the record from the remaining discovery that  
23 was taken further indicates the relevance of or the  
24 unique knowledge that Mr. Rizzi has.

1                   So I think I have to provide the  
2 parties with some brief ability to supplement. On the  
3 other hand, both because the record is already large  
4 and the parties have been waiting a while, and  
5 because, frankly, if I don't deal with this now, it  
6 will continue to linger.

7                   And the material's in my head and I  
8 need to try to resolve this quickly. The  
9 supplementation has to be -- and it has to be quick.

10                  And so instead of just saying a bunch  
11 of words now, which may not be exactly what I mean,  
12 what I'll do is issue a brief order today, again, on  
13 the docket that we'll provide the parties for a very  
14 brief chance to supplement based on what they think's  
15 happened in discovery as to the factors. And to do so  
16 relatively quickly.

17                  I mean, I'll give you some number of  
18 dates, but relatively quickly. So I can take it into  
19 account and try to just get you a decision so that  
20 you'll have it moving forward; okay?

21                  So that'll be held. You'll further  
22 deal with this motion to quash. So look for an order  
23 for me on that.

24                  MR. RIZZI: Thank you, Your Honor.

1 MS. ELLIOTT: Thank you, Your Honor.

2 THE COURT: All right. Let's move on  
3 to Defendant's discovery disputes. And let's bring  
4 those papers over.

5 And there are kind of a few of them.  
6 Let me see if I can try to bracket them for you. So  
7 the way -- and I'll talk to arguing counsel about  
8 this, but as I understand it from the letters and from  
9 Defendant's letter, you know, there were -- the first  
10 part of the letter kind of talks about three different  
11 kind of subsets of testimony in dispute. These are  
12 the ones that were kind of, like, first, second, third  
13 in Defendant's list.

14 And then the last part of the letter  
15 talks about kind of privileged log disputes, and  
16 whether certain information really is privileged, or  
17 in the case of litigation funding -- because some of  
18 those docs were logged at Judge Hall's request --  
19 whether it can be said that certain litigation  
20 funding-related documents that are logged on the  
21 privilege log are relevant to the case.

22 So my thought was -- and I'll talk with  
23 counsel who's arguing about these as we go through --  
24 let's hear from the parties about the first

1 categories. The discovery -- different categories of  
2 discovery Defendant's seeking.

3 Now there's some overlap, like -- some  
4 overlap there, between this and, like, maybe  
5 information regarding -- that Mr. Rizzi might have,  
6 which relates to the motion to quash. And there's  
7 some overlap sometimes about litigation funding with,  
8 like, docs in the privilege log. Otherwise, you know,  
9 it's discreet.

10 So the idea being that I would hear the  
11 disputes about the first, second, third issues, and if  
12 I can, try to resolve them here.

13 With regard to the privilege log, it  
14 seems like Plaintiff's -- or Defendant is suggesting  
15 that I look at these 25 docs, in camera, and I don't  
16 have those docs, I don't think. I have a list of  
17 them. I don't hear Plaintiff disputing that, but  
18 that's not a way to deal with this.

19 That said -- it struck me when I was  
20 reading, probably, it would give the plaintiff an  
21 opportunity if it's going to -- when it gives me these  
22 25 docs, it could be that in order to demonstrate, or  
23 not, whether the documents are privileged, some  
24 additional context might need to be provided.

1                   So, you know, typically what I would do  
2                   is I'd say, "Fine. Plaintiff, submit the 25 docs to  
3                   me, in camera," and to the extent you need to in order  
4                   to articulate more fully beyond what's actually  
5                   included in the document, by it is work product  
6                   protected or subject to the attorney-client privilege,  
7                   you can provide a relevant declaration. And then I  
8                   review them and I issue an order.

9                   And so my thought as to the latter  
10                  grouping is that's how I deal with it. But if you  
11                  disagree with that, you know, you can tell me when  
12                  we're talking; okay?

13                  All right. So with that as prelude,  
14                  who's going to be taking this for Defendant's side?

15                  MS. FRY: Good morning, Your Honor.  
16                  Ashley Fry of Latham & Watkins on behalf of Defendant  
17                  Netflix. Can Your Honor hear me okay?

18                  THE COURT: Yeah. I can hear you and  
19                  see you just fine, Ms. Fry.

20                  MS. FRY: Thank you. I will be  
21                  addressing Defendant Netflix's motion to compel new  
22                  deposition testimony based on improper instructions at  
23                  deposition.

24                  My colleague, Alessandra Schaszberger,

1 will address Robocast withholding of business  
2 documents and our request for in-camera review. So,  
3 Your Honor, Ms. Schaszberger will address Your Honor's  
4 proposal regarding in-camera review of documents.

5 THE COURT: Okay. But, like, in your  
6 letter, you know, there was two roman -- roman one and  
7 roman two. Roman two was about the privilege log  
8 issue. Roman one, it was like three subcategories.  
9 There was the first, the second, and the third. You  
10 know, the first was kind of about damages. The second  
11 was about a callback document. And the third was  
12 about, you know, business meetings, et cetera.

13 Are you covering first, second, and  
14 third?

15 MS. FRY: Correct, Your Honor. All  
16 three buckets.

17 THE COURT: Got it. Okay. Super. All  
18 right. So for first, the first one, which from your  
19 letter is, you know, testimony regarding the facts  
20 underlying Robocast's alleged reasonable royalty  
21 damages.

22 The first question I have is, okay,  
23 more specifically, what are we talking about? You  
24 know, like, what category of testimony is being

1 sought?

2 And this is what it looked like. Tell  
3 me if this is right. Three sub-buckets there. What  
4 damages does the plaintiff contend the defendant owes  
5 in the case? And maybe, like, what factors go into  
6 that damage calculation?

7 It seems like the second bucket was why  
8 didn't Plaintiff seek a license from Defendant before  
9 filing the lawsuit.

10 The third bucket was what was the  
11 valuation of the plaintiff that was provided to the  
12 company.

13 Are those kind of the sub-buckets you  
14 think are at issue there, or what do you think's at  
15 issue with regard to first?

16 MS. FRY: I think Your Honor summarized  
17 it correctly. With regards to the first issue on  
18 damages, Netflix is particularly looking to seek  
19 deposition testimony regarding the amount of damages  
20 that Robocast is seeking against Netflix. And  
21 including the amount of revenue it expects to earn  
22 from its lawsuit against Netflix.

23 So in this case --

24 THE COURT: And I'm sorry to jump in,

1 but --

2 MS. FRY: Yes.

3 THE COURT: So, like, it's literally,  
4 like, testimony about the amount of damages Plaintiff  
5 is seeking; is that right?

6 MS. FRY: Correct, Your Honor.

7 THE COURT: Have they told you in  
8 responses to your contention interrogatories what  
9 they're -- how much they're seeking in damages and,  
10 like, what the calculations are going into that?

11 MS. FRY: No, Your Honor. At the  
12 outset of the case, the parties served their Rule 26  
13 disclosures and Netflix requested that Robocast  
14 supplement its disclosures on damages to provide the  
15 computation required under Rule 26. Throughout  
16 discovery, Robocast refused to do so.

17 On the last day of fact discovery,  
18 May 13th, Robocast supplemented its interrogatory  
19 response regarding damages, but did not still provide  
20 a computation. It didn't even provide an approximate  
21 reasonable royalty range that it was seeking from  
22 Netflix.

23 And so therefore, throughout fact  
24 discovery, Netflix did not know the value of the case

1 from Robocast.

2 THE COURT: So, like, for example, you  
3 asked, but they haven't told you, you know, reasonable  
4 royalty is blank percentage. Or, you know -- and if  
5 you use that percentage, in our view, up until X date,  
6 you know, the damages number you owe is blank. You've  
7 asked that and they haven't given it to you?

8 MS. FRY: Correct. That was sought in  
9 our interrogatory request. It was sought in -- that  
10 we asked in correspondence regarding the Rule 26  
11 disclosures. They did not provide that information  
12 regarding either the percentage or the royalty base  
13 that they would use for calculating damages at all in  
14 fact discovery.

15 THE COURT: And the reason I ask is  
16 because, you know, I think when it comes to a  
17 deposition relating to, like, how much are you saying  
18 we owe in damages. And, like, what's the calculation  
19 you're using. You know, Judge Robinson used to talk  
20 about these as contention deposition topics. And I  
21 think the idea was, look, if you're asking, like, an  
22 in-house person, like Mr. Smith or somebody, about  
23 essentially what's our position going to be, well, of  
24 course the in-house person's going to talk to lawyers

1 to try to figure out what's the right answer. But  
2 it's only going to be at the point where the company's  
3 kind of decided, look, we're going to actually send in  
4 response to a contention interrogatory, here's our  
5 official position.

6 They make the call, like, look, this  
7 assertion is not something we're going to say is  
8 privileged.

9 And then I think the argument is, like,  
10 well, you wouldn't have a depo about that because,  
11 really, the witness would just basically be going over  
12 what should be in writing in the contention response.

13 And beyond that, to the extent it was,  
14 like, well, how'd you get there; you know? We only  
15 talked about that with my lawyers.

16 So I think the idea, at least in Judge  
17 Robinson's mind, I think she was articulating what she  
18 thinks is the view of our district, is let's get a  
19 good interrogatory about this and let's get a good  
20 answer. If you don't like the answer, let's get them  
21 to supplement the answer. But let's not be asking,  
22 like, you know, in-house counsel, you know, what  
23 number are you saying? And, like, how do you get  
24 there? You know, kind of thing.

1 Am I hearing from kind of your  
2 suggestion that, look, if we got a good interrogatory  
3 answer on this, we could obviate the need for  
4 deposition testimony?

5 MS. FRY: Your Honor, I think you hit  
6 the nail on the head. So we were hoping we would get  
7 an interrogatory response before depositions in this  
8 case that set for the amount of damages that Robocast  
9 was seeking. We did not get that until after all  
10 depositions were closed.

11 We sought to get information from  
12 Netflix's -- I'm sorry, Your Honor -- from Robocast's  
13 executives. Mr. Brett Smith in particular who was  
14 Robocast's Rule 30(b)(6) witness on finances. We  
15 asked him questions about the amount of revenue  
16 Robocast expected to earn from its lawsuit, or the  
17 amount of damages sought. We were blocked on the  
18 ground of privilege and were told we needed -- that  
19 that was conveyed through counsel, and we were not  
20 entitled to learn that information.

21 At that time, Your Honor, we did not  
22 have an interrogatory response or fulsome Rule 26  
23 damages disclosures. And so we could not assess or  
24 tease out the basis for any particular reasonable

1 royalty number at depositions.

2 So that was the situation we found  
3 ourselves in --

4 THE COURT: And I'm sorry to interrupt,  
5 but did you say you've since gotten a response though?  
6 Like, have they -- I think you were just telling me  
7 before, they haven't told you what's the royalty rate,  
8 how much in damages. Does that equal from between --  
9 whatever it is. Like, six years prior to where we are  
10 now. You haven't gotten what you think you're  
11 entitled to?

12 MS. FRY: Correct, Your Honor. So even  
13 after the depositions were ended, on the final day of  
14 fact discovery, even through their supplemental rog  
15 response, we still did not get the amount of damages  
16 sought either through percentage -- a reasonable  
17 royalty percentage or range -- or an understanding of  
18 how that calculation for damages would be performed.  
19 Including, for example, the royalty base that would be  
20 used to calculate damages.

21 We now have --

22 THE COURT: I'm sorry, Ms. Fry. Just  
23 list out for me, look, what we need, at minimum, is an  
24 answer to A. And it sounds like A is what is the

1 appropriate royalty base?

2 MS. FRY: Correct, Your Honor. So I  
3 will mention though because we are now in July, we are  
4 in expert discovery and we received Robocast's opening  
5 expert report on damages. So we know what their  
6 expert has set forth as his opinion on the amount of  
7 reasonable royalty.

8 So I wanted to make Your Honor aware  
9 that we have that information through their expert,  
10 but it was not something that we were able to obtain  
11 from the witnesses during the discovery on the ground  
12 of privilege.

13 THE COURT: Okay. But if I'm asking  
14 about -- see, what I'm suggesting is that, in an ideal  
15 world, we wouldn't get this from a witness. We'd get  
16 it from a good rog response. And if Defendant is  
17 saying, "Look, I'm in the dark about what the answers  
18 to these key damage questions are because we never got  
19 them," I think part of what you're saying now is  
20 subsequently, we do have an expert report.

21 I mean, if the expert report does  
22 provide royalty rate, base, et cetera, what utility  
23 would there be for me to have them go back and say,  
24 "Resubmit a supplemental contention interrogatory

1 response"?

2 MS. FRY: Well, Your Honor, the  
3 expert -- Robocast's expert relied on interviews with  
4 Robocast executives Mr. Smith and Mr. Torres, on  
5 topics that we were -- we had sought to ask them  
6 questions on in their depositions. Those formed the  
7 basis for their expert's opinion in this case.

8 And so one example would be how  
9 Robocast would structure the royalty at a hypothetical  
10 negotiation with Netflix. And their expert relied on  
11 Mr. Smith and Mr. Torres' preferences for a running  
12 royalty as opposed to a lumpsum royalty.

13 We could not ask questions regarding --  
14 or get that information either through a rog --  
15 interrogatory -- or through our questioning at  
16 depositions.

17 So that's one example of where we are  
18 seeking the facts underlying damages that their expert  
19 obtained from Robocast, but that Netflix was blocked  
20 from obtaining.

21 THE COURT: Okay. So that seems  
22 slightly different, but related. Which is you're  
23 saying an expert report's been submitted, relies for  
24 damages related principles on information provided by

1 certain witnesses, including Mr. Smith. And you  
2 didn't have the ability to test at deposition the  
3 substance of Mr. Smith's discussions with the expert,  
4 that the expert is now relying on?

5 MS. FRY: So, yes. We were not able to  
6 obtain from Mr. Smith factual information that then  
7 Robocast's expert ultimately cited in his report and  
8 relied on.

9 THE COURT: Okay. And I thought the  
10 issue was about Mr. Smith's deposition here. There's  
11 nobody else's testimony you're seeking with regard to  
12 this first issue; is there?

13 MS. FRY: So I would say, Your Honor,  
14 to the extent -- the issue about the amount of damages  
15 largely came up through questions of Mr. Smith,  
16 including the amount of anticipated revenue that  
17 Robocast would earn from Netflix. That issue also  
18 came up in Mr. Torres' deposition as well -- the  
19 amount of damages sought. So it wasn't just  
20 Mr. Smith.

21 THE COURT: Smith and Torres. Okay.

22 MS. FRY: Correct.

23 THE COURT: All right. Then for the  
24 clawback document issue, am I right here that the

1 issue seems to be about why Plaintiff didn't send the  
2 defendant a notice letter?

3 MS. FRY: No, Your Honor. So for the  
4 clawback document, so this was a document that Netflix  
5 showed to Mr. Smith --

6 THE COURT: Oh, I'm sorry. I'm sorry.  
7 Not the clawback. I'm jumping ahead to the next  
8 bucket here.

9 MS. FRY: Oh, okay.

10 THE COURT: Staying in the first  
11 bucket, the second sub-issue raised in the first  
12 bucket is about the issue of why the plaintiff didn't  
13 seek a license from the defendant. Not the clawback  
14 issue. That'll be later. And this is referenced on  
15 page one of your letter.

16 On that issue, you know, Mr. Smith's  
17 asked, "How come you guys didn't send Netflix a notice  
18 letter?" And he says, "Look, the only info I have on  
19 that comes from my conversations with counsel." And I  
20 guess the question is do I have any basis to say that  
21 that assertion's false?

22 MS. FRY: Well, Your Honor, Netflix was  
23 seeking the facts underlying Robocast's business  
24 decision not to send a letter to Netflix.

1 Attorney-client privilege protects the  
2 communications themselves, which Netflix was not  
3 seeking from Mr. Smith, but rather the facts  
4 conveyed -- the facts underlying a privileged  
5 communication are not themselves privileged.

6 And to the extent Mr. Smith or Robocast  
7 made a decision not to send a letter to Netflix, and  
8 that was a business decision and not a communication  
9 from counsel, that is subject to a deposition  
10 question.

11 THE COURT: Right. But, I mean, it  
12 seems like Mr. Smith was suggesting -- tell if I'm  
13 wrong. The question is, "Why didn't you, Robocast,  
14 send Netflix a licensing offer?" It sounds like he  
15 was saying, "Well, look, if I was going to tell you  
16 the answer to that, what would the answer be? It is I  
17 had a conversation with my counsel. Should we send  
18 them a licensing letter? And counsel said" -- I'm  
19 just making this up -- "don't do it. It's my legal  
20 advice that if you do that, then we could have some  
21 issues with venue or, you know, with regard to other  
22 legal issues in the case. It's not ultimately  
23 beneficial. Instead, we should simply sue."

24 I think he's suggesting that the only

1 answer to the why came through discussions with  
2 counsel. And to say why would disclose the substance  
3 of the conversations with counsel.

4 Do you understand that differently?  
5 And if not, how could requiring the provision of facts  
6 not disclose the substance of attorney-client  
7 privileged communications?

8 MS. FRY: So I think, Your Honor, I  
9 understand your point. I think -- at least from  
10 providing the context, Netflix was asking Mr. Smith  
11 regarding prior demand letters that Robocast had sent  
12 to multiple other companies before it either sought a  
13 license from them or decided not to sue them. And so  
14 this was in the context of discussing those other  
15 demand letters, and to understand Robocast's decision  
16 just to provide notice to certain companies, while not  
17 others.

18 I think one --

19 THE COURT: I'm sorry. Just to make  
20 sure I'm following, Ms. Fry. I'm talking about, to  
21 me, it seems like it came down to the questions on  
22 page 257 to 258 of Mr. Smith's depo. Like, you know,  
23 question, "Did Robocast ever send Netflix a letter  
24 asking Netflix to take a license to Robocast patents?"

1 Answer, "No." "Why not"; right?

2 And then that's the part of the depo  
3 that's cited I think in the letter -- in your letter  
4 as to this issue -- this sub-issue. And Mr. Smith  
5 says he can't answer because to answer would disclose  
6 the contents of privileged communications.

7 Isn't that the question that we're  
8 really talking about here? How come you didn't send  
9 Netflix a notice letter?

10 MS. FRY: It is, Your Honor. And you  
11 pointed to the correct page. I think our concern, and  
12 as Ms. Elliott stated in her following question on  
13 that same page, 257, of Mr. Smith's transcript. The  
14 issue for us is is Robocast then going to at trial  
15 tell the jury why it didn't send a demand letter to  
16 Netflix?

17 And so --

18 THE COURT: No. They can't do that  
19 because they can't use privilege as a sword and  
20 shield. They know. They got to give it up. You  
21 know, they'd have to give up the ability to do that.  
22 But if they did, if they understood that, that they  
23 had to give up the ability to try to use, you know,  
24 like, oh, here's why we did or didn't do X or Y with

1 regard to a notice letter, you would be okay with  
2 foregoing any further questioning on this subject?

3 MS. FRY: If Robocast can confirm it  
4 will not tell the jury any bases or reason why it did  
5 not send a demand letter to Netflix, we would not  
6 pursue further testimony on that point based on that  
7 representation, Your Honor.

8 THE COURT: Okay. And then thirdly,  
9 this issue about valuation of Robocast. Here it seems  
10 like, you know, at issue was, like, pages 124 to 134  
11 of Mr. Smith's deposition. You know, which started  
12 off with the question, "Are you aware of any  
13 valuations performed by Robocast?"

14 And when I read through the whole ten  
15 pages, it seemed like Smith was saying, "Look, I'm  
16 aware of one valuation. And that valuation that I'm  
17 thinking of happened somewhere between 2014 and 2016.  
18 And the valuation came through conversations with  
19 outside counsel." And then the other side says, look,  
20 and we followed up on pages 324 to 327, and  
21 established that in fact that's what happened.  
22 Outside counsel provided information about valuation.  
23 That's what Smith was thinking of. That's the only  
24 thing he recalled, so that's clearly privileged.

1                   How come that isn't what we've got here  
2                   with regard to this issue?

3                   MS. FRY: So again, Your Honor,  
4                   Netflix's questions were seeking the facts relating to  
5                   the valuation. For example, the existence of the  
6                   valuation itself and the amount of the valuation of a  
7                   share in Robocast. Mr. Smith refused to provide the  
8                   basic fact of the value of a share in the company.

9                   And this is a topic that Netflix has  
10                  tried to understand the bases for privilege over,  
11                  including follow-up discussions where Netflix asked  
12                  whether Robocast would be willing to log -- supplement  
13                  its privilege log to identify the valuation and any  
14                  materials provided to that outside consulting company  
15                  regarding the valuation.

16                  Robocast agreed to look into it and to  
17                  look to see whether those materials were logged, or to  
18                  then supplement and include them on the privilege log.  
19                  To date, they have not done so.

20                  And so this is another example -- and  
21                  again, Your Honor, we have their opening expert report  
22                  on damages where he cites Brett Smith's testimony  
23                  regarding the valuation. And he cites interviews with  
24                  Brett Smith with further -- having learned further

1 information about the valuation from Brett Smith  
2 directly, that then Netflix was not able to ask about.

3 And so this is another sword and the  
4 shield situation where Robocast's expert can rely on  
5 Brett Smith for information regarding the valuation,  
6 but Netflix cannot explore that information in fact  
7 discovery, either through a supplemental privilege log  
8 or through asking Mr. Smith basic factual questions  
9 underlying those valuations.

10 THE COURT: I guess just -- because I  
11 think as was the case with the first issue, I think in  
12 part again you're talking about some things that are  
13 now in the record with regard to expert reports that I  
14 wouldn't know about until, you know, I hear the words  
15 coming out of your mouth.

16 So you have to help me focus on what I  
17 could've reasonably prepared for here. Again, and I  
18 forget, but I think it's in -- it'll help me if I can  
19 find -- yeah. Okay. Smith's deposition. The part  
20 that was provided by Plaintiff, which is their  
21 Exhibit 3. And on pages 324 to 327, this is all I  
22 have before me, so this is all I can prepare on is  
23 what are we talking about.

24 Plaintiff's counsel says something

1 like, "Hey, look. You remember when you got asked  
2 some questions about whether you knew anything about a  
3 valuation of Plaintiff's shares?" He says, "Yes."  
4 And he says, "Look, I was thinking -- it's in the 2014  
5 to 2016 range that I learned that information." And  
6 he said he couldn't be more specific than those for  
7 dates. And then it seems like the question's, like,  
8 "Where'd you get that information?" Like, about what  
9 the purported value of Robocast or a share of Robocast  
10 was. And he says, "From Foley & Lardner." And he  
11 names a particular lawyer who told him the  
12 information. And he says it was an opinion of  
13 counsel. And he essentially says, you know, that's  
14 it. "Foley & Lardner, my lawyer, conveyed to me a  
15 valuation. That's the only information I have.  
16 That's an attorney-client privileged communication."

17 That's all I know based on the record.  
18 Are you saying that -- and if that's all I know, that  
19 sounds like a communication between lawyer and client,  
20 in confidence -- arguably, but for the provision of  
21 providing legal advice. The company as it relates to,  
22 you know, maybe assertions of patent value.

23 Are you saying that there's some extra  
24 or additional record in evidence that indicates that

1 whatever that valuation is they're talking about,  
2 there's information that Mr. Smith shared with  
3 somebody else? An expert -- that showed up in an  
4 expert report that you have now? Or what can you help  
5 me with there?

6 MS. FRY: So two points, Your Honor.  
7 I'll direct you back to Exhibit B, to Netflix's  
8 opening letter on page 126 of Mr. Smith's transcript,  
9 where Ms. Elliott asked Mr. Smith -- and this is lines  
10 20 through 21 on page 126 -- "You can't answer what  
11 the value of a share in the company was?"

12 And so this is not a communication  
13 conveying legal advice. This is a fact. The amount  
14 of a share in the company is purely factual. And we  
15 have asked and have not received authority from  
16 Robocast that would protect as attorney-client  
17 privilege the value of a share in their company.

18 To my second point, Your Honor, I  
19 appreciate that the expert reports are not in front of  
20 Your Honor. And this is additional context given  
21 where we are in the case right now. But our concern  
22 is that their -- Robocast's expert has had access to  
23 information regarding this valuation, outside of this  
24 transcript and what Mr. Smith was -- thought he was

1 able to provide without disclosing attorney-client  
2 privilege.

3 And so we just want to make sure that  
4 Netflix is on the same footing as Robocast when it  
5 comes to information regarding this valuation that  
6 Robocast conveyed to its expert witness.

7 THE COURT: Okay. So let me see if I  
8 can summarize what I think you've said.

9 In the deposition, yes, it looks like  
10 Smith is saying, "The only information I can recall  
11 about the valuation of Robocast came from a  
12 conversation I had with my lawyer."

13 And even to the extent that I was later  
14 asked, you know, "What's the value of Robocast?" You  
15 know, can you tell me something about the value of  
16 Robocast? The only thing Smith said was, "The only  
17 information I had about that is in a conversation I  
18 had with a Foley & Lardner lawyer."

19 And what you're saying is a subsequent  
20 expert report, which I don't have in front of me,  
21 indicates that an expert is making assertions about  
22 the value of Robocast -- or shares? I don't know --  
23 and cited as support for that statement about  
24 valuation are conversations with Mr. Smith; is that

1 correct?

2 MS. FRY: Robocast's expert refers to  
3 the valuation that Mr. Smith testified about in his  
4 deposition, through interviews with Mr. Smith.

5 One point, Your Honor, about the value  
6 of a share. So --

7 THE COURT: Oh, I'm sorry. I just  
8 don't understand your answer to my question.

9 MS. FRY: Sure.

10 THE COURT: So, again, let me just try  
11 to go back. Based on what I know versus what you're  
12 saying. It looks to me from reading the materials  
13 that I have before me, particularly pages 124 to 134  
14 of Mr. Smith's deposition, which I understand to be  
15 really at issue here, is that Smith says that he was  
16 trying to convey during that deposition -- and in the  
17 additional couple pages of redirect from that depo --  
18 that the only information he had in his mind about the  
19 value of Robocast, or valuation of a share or stock in  
20 Robocast, came from a conversation with a lawyer.

21 And I'm saying, based on what I've read  
22 in there, if that were correct, it seems like possibly  
23 a privileged conversation.

24 But you're seeking more testimony from

1 a 30(b)(6) witness, Mr. Smith or otherwise, about  
2 Robocast's view of the value of a share, or the value  
3 of Robocast, whatever it is, and I'm wondering, you  
4 know, what's the basis for that? You know, because  
5 all I have before me from the record is Smith saying,  
6 "The info I have about that's a conversation with a  
7 lawyer."

8 Is there other information that you  
9 have that's been provided to you through an expert  
10 report that indicates that there were -- that now it's  
11 been shared with you that the value of a share of  
12 Robocast or the value of Robocast is drawn from  
13 conversations with Mr. Smith or otherwise that you're  
14 saying you didn't get to depose more on?

15 MS. FRY: So, Your Honor, I'm hoping  
16 I'm answering your question directly, but in terms of  
17 their expert report, and what he's relying on, and  
18 information he has, we understood his report to get  
19 information regarding the value of the share from  
20 businesspeople at the company. Not from outside  
21 counsel or outside consultants, providing them  
22 information to Robocast.

23 I think one point I would like to make,  
24 Your Honor, just because information was provided to

1 Mr. Smith from counsel does not make it automatically  
2 privileged. Just because he heard it from a lawyer  
3 does not make that fact -- factual information  
4 privileged.

5           Though the case law is clear that the  
6 communication itself is protected, and that again is  
7 not what Netflix sought from Mr. Smith in his  
8 deposition. It was just what the value of the share  
9 was, even if that information was provided in a  
10 communication from counsel.

11           THE COURT: If Smith says to his  
12 lawyer, "Can you give me your view about what the  
13 value of a share in Robocast is?" You know,  
14 presumably vis-a-vis your thoughts about the value of  
15 our IP. And the lawyer says, "\$100." That's the only  
16 conversation Smith has with anybody about the value of  
17 a share of Robocast, then it's okay for you to get  
18 from Smith that his view is the value of a share is  
19 \$100. It's not privileged because that's a fact?

20           MS. FRY: Correct, Your Honor. And  
21 I'll actually cite In Re: Teleglobe Communications  
22 from the Third Circuit in 2007. That's 493 F.3d 345.  
23 And privilege applies to communications for the  
24 purpose of obtaining or providing legal advice. Legal

1 advice.

2 The value of a share in Robocast is  
3 business information. This is information that would  
4 be important and relative to investors of Robocast, in  
5 choosing to invest in the company. This is not, for  
6 example, a patent enforcement strategy. This is a  
7 value of a share in an entity that has, to Mr. Rizzi's  
8 point earlier, obtained investments from multiple  
9 third parties. So this is outside of the context of  
10 when attorney-client privilege would apply in  
11 Netflix's view.

12 THE COURT: Okay. And then the last  
13 question there is are you saying -- like, when you had  
14 their expert report, does the expert provide a value  
15 of a Robocast share? And when he does, or she does,  
16 is there, like, a footnote that says, "Based on  
17 conversations with, you know, Mr. Smith" or somebody  
18 else?

19 MS. FRY: No, Your Honor. Robocast's  
20 expert does not actually provide the value of the  
21 share that Netflix sought through Mr. Smith.

22 However, such information could be  
23 pertinent to Netflix's damages expert who would like  
24 to take into account other information obtained in

1 fact discovery from Robocast's witnesses that could  
2 bear on his opinion on damages, in rebuttal to  
3 Robocast's damages expert.

4 THE COURT: Okay. Let me pause there  
5 because it'll help this to break these things up,  
6 because there's so many of them.

7 Let me try to get Plaintiff to you on  
8 this and then -- so I can try to resolve and get  
9 through it.

10 Who's going to be speaking on behalf of  
11 Plaintiff as to this dispute?

12 MS. TALMAGE: Good morning, Your Honor.  
13 Mariel Talmage from McKool Smith representing  
14 Plaintiff Robocast on this issue.

15 THE COURT: Okay, Ms. Talmage. Good  
16 morning. Let's just take these one, two, three, like  
17 I did with Ms. Fry.

18 So with regard to the issue of what  
19 damages does Defendant owe, it's I think asserted that  
20 you all didn't provide a clear answer on that up until  
21 expert reports.

22 Then expert reports are provided in the  
23 case and in order to -- for the expert to provide a  
24 view on damages, the expert is said to have had

1 conversations with folks, including Mr. Smith, that  
2 gave rise to the expert's view about damages.

3 Hold on one second.

4 Mr. Fry, do I have that right?

5 MS. FRY: Yes, Your Honor.

6 THE COURT: Okay.

7 Ms. Talmage, if that's true, if your  
8 expert derived information regarding Plaintiff's  
9 current damages assessment from conversations with  
10 Mr. Smith, but if Mr. Smith wasn't permitted to talk  
11 about his view about damages, he couldn't have been  
12 asked question about, like, you know, these factors --  
13 whatever he told the expert. Should they be able to  
14 get another shot at Mr. Smith for that?

15 MS. TALMAGE: Thanks, Your Honor. Just  
16 to kind of correct what has been represented here,  
17 I -- what I heard my colleague from Netflix say is  
18 that now they're concerned about the structure of a  
19 royalty, which I don't recall seeing in their letters  
20 at all.

21 And as you pointed out, the questions  
22 that they didn't point to in their letters asked for  
23 privilege, damages, contentions.

24 Regardless, I don't believe that this

1 would justify any additional deposition testimony of  
2 Mr. Smith, who's been deposed for seven plus hours in  
3 this case. And Mr. Torres, who's been deposed for 14  
4 plus hours in this case.

5 We will be having expert depositions.  
6 And to the extent Netflix is concerned about anything  
7 that was communicated to our expert from Robocast  
8 employees, they're free to explore those  
9 communications at that time.

10 But to me, this seems like a complaint  
11 about our contention interrogatories and a complaint  
12 about our damages disclosures, which we disagree with.  
13 But regardless, the proper vehicle isn't really a  
14 motion to call a 30(b)(6) witness back to testify on  
15 contentions after fact discovery is closed and after,  
16 you know, seven hours of testimony already.

17 THE COURT: And, Ms. Talmage, I  
18 understand your point in terms of, look, if you don't  
19 think we said enough in our contentions, you know, go  
20 to the judge and get better contentions. You know,  
21 don't ask an in-house lawyer, you know, on behalf of  
22 the company, like, "What's your calculation going to  
23 be?"

24 You know, I think the defendant's

1 right. They're entitled to getting answers to these  
2 key questions before expert discovery. Of course,  
3 we're already there.

4 But now it's asserted that -- I  
5 think -- that the reason why they think they should be  
6 able to depose the company, i.e. Smith, is because in  
7 your expert reports, in the section about damages,  
8 there's, like, footnotes that say stuff like, you  
9 know, "In support for this assertion about royalty" or  
10 something else, "I rely on conversations I had with  
11 Mr. Smith."

12 Does your expert report say that, or  
13 does it not, or to what extent?

14 MS. TALMAGE: Not to the extent that  
15 there's information unique to Mr. Smith that was  
16 blocked by Robocast's counsel's proper privilege  
17 instructions.

18 Of course, there's places where  
19 interviews have been supplemental to information that  
20 was already provided, but I'm not aware of our expert  
21 relying solely on communications with Mr. Smith about,  
22 you know, main damages contentions.

23 I will point out that in our  
24 interrogatory response, we explained that, you know,

1 the ultimate calculation of damages is up to our --  
2 you know, we'll be relying on our expert for that. We  
3 explained how our expert planned to do the analysis.  
4 We've identified three potentially relevant licenses,  
5 and identified that we intended to rely on the license  
6 with Vevo as representative. And -- or not  
7 representative. My apologies. Comparable for  
8 purposes of calculating a royalty. And all of the  
9 information you need to know is in that license.  
10 There's nothing to add from Mr. Smith in further  
11 deposition testimony.

12 THE COURT: Okay. With regard to the  
13 second issue about the demand letter, or lack of a  
14 demand letter. The other side says, "Look, as long as  
15 the plaintiff isn't going to, like, bring up at trial  
16 anything about, you know, why they didn't send a  
17 demand letter or anything on that topic, you can let  
18 this go."

19 Are you going to do that or can we let  
20 this go?

21 MS. TALMAGE: Your Honor, I think I can  
22 commit to let this go. And if Mr. Rizzi wants to jump  
23 in -- it looks like he's unmuted -- to help me out on  
24 this one. But --

1                   And I would just say that, you know, if  
2                   that was really a concern, we can deal with it with a  
3                   motion in limine. As we're heading towards trial, it  
4                   doesn't justify additional deposition testimony.

5                   MR. RIZZI: Yes, Your Honor.  
6                   Obviously, as long as Netflix doesn't open the door,  
7                   that's not any fact that we're going to rely on in  
8                   terms of any advice of counsel behind the reasoning  
9                   for not sending them a licensing letter.

10                  And just briefly in the past, I think  
11                  Mr. Talmage also meant to point out that if you look  
12                  at their letter on the privilege instructions to  
13                  Mr. Smith, those are clearly privileged questions.  
14                  What they're complaining about now is really the fact  
15                  that maybe they didn't ask Mr. Smith everything they  
16                  wanted to ask in hindsight. I mean, they had the  
17                  opportunity to ask all the factual questions. He was  
18                  not blocked on any factual questions concerning  
19                  damages-related issues. The only ones they point to  
20                  were clearly privileged. So I just wanted to make  
21                  sure that was clear.

22                  THE COURT: Okay.

23                  MS. TALMAGE: Thank you.

24                  THE COURT: Ms. Talmage, on issue three

1 with regard to, you know, a valuation of a share of  
2 the plaintiff, what more do you want to say in  
3 response to what you heard from Ms. Fry on that issue?

4 MS. TALMAGE: Sure. First of all, the  
5 implication that Mr. Smith refused to answer factual  
6 questions of that effect, price per share is not  
7 really correct.

8 You can see in Netflix's Exhibit B,  
9 which is Brett Smith's deposition transcript, on page  
10 128, line 4, to page 129, line 14, that Mr. Smith  
11 actually offered to tell Netflix counsel a price per  
12 share that has been told to investors. But counsel  
13 refused that offer, and instead insisted on pressing  
14 for disclosure of the price per share in this  
15 privileged valuation that was offered -- that was  
16 provided to Robocast as part of a fairness opinion by  
17 its outside counsel, as Brett Smith testified.

18 THE COURT: Well, hold on a second.  
19 You said Smith was, like, ready to talk about, you  
20 know, "Oh, well, what did -- have you shared anything  
21 with a third-party investor about a value per share?"  
22 And he was ready to do it, but just never got asked.

23 I mean, it looks like when asked the  
24 question, when an investor asked Robocast what the

1 value of a share is, the response is that it's  
2 privileged. His response was, "I can't recall a  
3 specific instance where an investor asked about a  
4 third-party valuation of a price of a share." I read  
5 that as Smith saying, "I've never had a conversation,  
6 nor on behalf of our company am I familiar with one,  
7 in which one way or the other there was a  
8 communication with a third party about what the value  
9 of a share of Robocast is."

10 It sounds like you're saying, no, he  
11 would've been happy to talk about that subject.

12 MS. TALMAGE: Yes, Your Honor. I think  
13 what Mr. Smith was saying was that he had not been  
14 asked by an investor about the results of a  
15 third-party valuation. The record is clear that  
16 Robocast performed its own in-house valuations, which  
17 Brett Smith had testified to. And price per shares  
18 based on those in-house valuations, based on what  
19 investors have paid for them, are included in all of  
20 the cap tables that we've produced.

21 Robocast accountant, Kenneth Hicks,  
22 testified as to how those were calculated, which were  
23 based on, you know, Robocast's own sense of value of  
24 its company, based on what investors were willing to

1 give them. So any publicly shared valuation is all  
2 over the discovery. The only thing not --

3 THE COURT: This was a 30(b)(6)  
4 deposition; right? So this is the one that was on  
5 behalf of the company.

6 MS. TALMAGE: Yes.

7 THE COURT: And are you -- I guess what  
8 I'm asking is, yes, it's clear that during some of  
9 this discussion, Smith is saying, "Look, I'm familiar  
10 with a valuation of our shares that I received from  
11 counsel." And then later, your counsel kind of  
12 confirmed some of the facts about that. Foley &  
13 Lardner provided some kind of valuation to them.

14 And then the questions are kind of  
15 like, "Yeah, but I'm also wanting to know, like, is it  
16 really true that you never talked to investors about  
17 what your view of the value of a share was? Well,  
18 what'd you say to investors about that"; you know?  
19 And Smith seems to say he doesn't have any such  
20 information.

21 Are you saying, "Oh, yeah. There's  
22 lots of information about what Robocast communicated  
23 to investors about what a value of their share would  
24 be in the relevant time period. And Mr. Smith

1 could've talked about that if people had asked him the  
2 right questions"?

3 MS. TALMAGE: Yes, I believe so. I  
4 think that's about right. I'm saying that there's  
5 documents showing the price per share of -- based on  
6 certain investments throughout the cap tables that  
7 we've provided. And I've also pointed to testimony  
8 from Mr. Smith where he offered to say, "I can tell  
9 you what we've told investors about prices per share,  
10 presumably when they are" --

11 THE COURT: Where is that testimony?

12 MS. TALMAGE: So that's in Exhibit B  
13 at -- Netflix's Exhibit B at page 128 to 129.

14 THE COURT: But where particularly?  
15 Show me the words.

16 MS. TALMAGE: Sure. Let me -- I'm so  
17 sorry. I'm sorry, Your Honor. I'm just navigating to  
18 the exhibit.

19 So for example, the exchange on page  
20 128, starting at line 17, counsel for Netflix asked,  
21 "When an investor asks you for the value of a share,  
22 do you tell them the response is privileged?"

23 And Mr. Smith testified that Robocast  
24 can communicate the price of a share to an investor.

1 That since you're asking a hypothetical question, I  
2 will give you a hypothetical answer. Robocast can  
3 communicate a share price to an investor without  
4 revealing attorney-client privileged communications.

5 And counsel for Netflix says, "I'm  
6 asking you to do the same thing in this deposition,"  
7 but then proceeds to ask about only the valuation of a  
8 share from the attorney-client privileged valuation.

9 THE COURT: Okay. So are you saying  
10 that if counsel had then said, "Okay. So let's walk  
11 through the different times in which Robocast has  
12 communicated to third parties the value of a Robocast  
13 share, tell me the first one you recall," then  
14 Mr. Smith would've been happy to walk through all that  
15 Robocast had said over the relevant time period to  
16 third parties about what the value of a Robocast share  
17 was? But he just wasn't asked the question?

18 MS. TALMAGE: Well, yes. I believe  
19 that, you know, he would be prepared to testify to the  
20 documents concerning prices per share, and how those  
21 prices were determined, and how those prices were  
22 communicated to investors who paid them.

23 THE COURT: Okay. And then with regard  
24 to this valuation that apparently was done by Foley &

1 Lardner, I think the other side says, "Well, just  
2 because that valuation came from a lawyer and was  
3 communicated in confidence, that's not enough to  
4 demonstrate that that subject matter is privileged  
5 because it doesn't relate to legal advice." It's  
6 simply a fact, that's nonlegal advice.

7 What's your response to that?

8 MS. TALMAGE: My response would be  
9 that, respectfully, I disagree with counsel for  
10 Netflix's understanding of attorney-client privileged  
11 communications.

12 As we've included in our opposition,  
13 the facts are clear that this valuation was  
14 communicated from outside counsel solely for the  
15 purposes of advising on a stock transaction, and  
16 providing a fairness opinion on that transaction. It  
17 was not shared outside of Robocast. It's part and  
18 parcel of the legal advice they're received. And I  
19 don't see any basis for requiring its disclosure.

20 THE COURT: Okay. Ms. Talmage,  
21 anything further about this bucket of issues?

22 MS. TALMAGE: Sure. Yes. I would just  
23 like to correct the record about what has been  
24 included in expert reports about this valuation. I

1 could pull up the paragraph, the single paragraph that  
2 discusses it if you would like, or read the content to  
3 you, or provide it to the court separately. But --

4 THE COURT: I mean, the truth is,  
5 Ms. Talmage, I think it's probably not worth it. All  
6 this stuff's extra record to me. You know, I can't  
7 make some conclusion that would grant or deny relief  
8 based on the content of some report I haven't seen.  
9 So --

10 MS. TALMAGE: Sure.

11 THE COURT: I mean, if there's  
12 something you want to put briefly on the record, you  
13 can, but --

14 MS. TALMAGE: Sure, Your Honor. Yes.  
15 I would just note that the only mention of this  
16 valuation in our damages expert's report summarizes  
17 Mr. Smith's testimony on the matter. There are  
18 footnotes that there was additional conversations with  
19 Mr. Smith, but nothing indicates that any additional  
20 information outside of what was communicated in his  
21 deposition was communicated to our expert. And it  
22 certainly wasn't included or relied on in his report.  
23 And Netflix can depose our damages expert about those  
24 communications if they would like.

1 THE COURT: Okay. Thank you.

2 All right. Ms. Fry, is there anything  
3 further on this first bucket before I resolve the  
4 issue?

5 MS. FRY: Yes. A couple of points,  
6 Your Honor. So the valuation performed, Mr. Smith  
7 confirmed on redirect that it was by a consulting  
8 firm, Dahl Consulting. And I don't believe  
9 Ms. Talmage was able to point to any statement in  
10 Mr. Smith's transcript that gave Netflix's counsel an  
11 invitation to ask questions about the value of a share  
12 that was communicated to investors.

13 It was pretty clear that such questions  
14 would just be hypotheticals, and that he would not  
15 provide information regarding the value of a share  
16 because that was purely within the realm of  
17 attorney-client privilege.

18 So we were not able to ask follow-up  
19 questions regarding that value of a share from a  
20 2014-2015 Dahl Consulting valuation. I just wanted to  
21 clarify the record. It wasn't Foley, it was Dahl  
22 Consulting that provided that valuation.

23 THE COURT: Okay. So this reference to  
24 Dahl Consulting, never seen it in any papers. Don't

1 know that I've ever seen it in any deposition  
2 transcript.

3 The redirect I was pointed to by  
4 Plaintiff in the letters says that the valuation they  
5 were talking about was provided by Foley & Lardner as  
6 to a fairness opinion, and was for the purpose of  
7 providing legal advice regarding that fairness  
8 opinion. I don't know anything about Dahl Consulting  
9 or any -- I don't know what you're -- is there  
10 something more you want to tell me about what's in the  
11 record about what you're saying?

12 MS. FRY: Yes, Your Honor. So this is  
13 Exhibit 3 to Robocast's opposition letter. And this  
14 is Mr. Smith's testimony on redirect, and it's on page  
15 330, Your Honor. Line 16. And Mr. Smith was asked,  
16 "Mr. Smith, who was the third-party expert that you  
17 just testified that did the valuation?" Mr. Smith's  
18 answer, "I believe the name was Dahl, D-A-H-L,  
19 Consulting."

20 And he was then asked, "What's the name  
21 of individuals with whom Robocast interacted for  
22 purposes of providing that valuation?" His answer,  
23 "Mr. Kantaros. I don't recall if there was any direct  
24 communication between Robocast and the expert."

1                   So the valuation itself was performed  
2                   by a consulting firm.

3                   THE COURT:   Would I have a basis to  
4                   conclude that Robocast's lawyers did not engage an  
5                   agent to provide legal advice, and the agent was this  
6                   consulting firm?

7                   MS. FRY:   If that's the case, Your  
8                   Honor, that's fine, but that does not -- that's  
9                   Robocast's burden to show that privilege would apply  
10                  to the factual underpinnings for a valuation.  I mean,  
11                  in particular, the value of a share as I've stated  
12                  earlier.  And Robocast has never made an agency  
13                  argument with respect to Dahl Consulting.

14                  THE COURT:   Right.  But didn't you --  
15                  you had a reply brief where, if you wanted to --  
16                  unlimited space, could've said, "Hey, look, they said  
17                  that, you know, this was a legal opinion, fairness  
18                  opinion provided by counsel.  But look at page 330;  
19                  you know?  It's provided by an outside entity.  We're  
20                  taking the view that that's not an agent."  You didn't  
21                  do that; right?  That wasn't mentioned in your reply  
22                  letter.

23                  MS. FRY:   I don't believe so, Your  
24                  Honor.  But we also pointed out that Robocast has the

1     burden on privilege and hasn't shown any or pointed to  
2     any case that supports prohibiting testimony regarding  
3     the value of a share, regardless of whether that value  
4     was provided in a communication from counsel.

5                     THE COURT:   And regardless of this Dahl  
6     Consulting issue, I think I understand you -- but tell  
7     me if I'm wrong -- to say, "Look, in the deposition,  
8     the 30(b)(6) depo, we wanted answers and we were  
9     asking questions that we thought should provide  
10    answers about communications Robocast had with third  
11    parties about the value of a Robocast share. We think  
12    we were asking those questions. And Smith we think  
13    said he didn't have such information.

14                    "And if we could, we'd love to take  
15    another depo where we start talking to him on behalf  
16    of the company about times Robocast communicated with  
17    third parties about the value of a Robocast share"; is  
18    that correct? Do you want to take that further  
19    testimony?

20                   MS. FRY:   Yes, Your Honor. We would  
21    like to ask Mr. Smith further questions regarding  
22    information conveyed to investors as to the value of  
23    the share. Information that Robocast has had in its  
24    possession regarding the value of a share in its

1 company.

2 THE COURT: Got it. Okay. All right.  
3 Ms. Fry, anything else? Because I need to move so we  
4 make sure we get through all your issues. Anything  
5 further?

6 MS. FRY: I believe that covers the  
7 first set of questions, Your Honor, in that first  
8 bucket.

9 THE COURT: Okay. On this first bucket  
10 of issues regarding damages, I'm going to give you my  
11 decision. I'm going to try to do that to the extent I  
12 can here on our call, so the transcript of the --  
13 today's teleconference -- or videoconference will  
14 serve as the substance of the court's order.

15 With regard to the motion as it relates  
16 to the category of issues that we're labeling as  
17 first, on page one and two of Defendant's opening  
18 brief, these relate roughly to damages.

19 In my view, there were three  
20 sub-issues. First, the defendant wanted to seek  
21 further testimony about the amount of damages that the  
22 plaintiff contends it owed, and perhaps the factors  
23 going into that number.

24 On that ground, I'm going to deny the

1 request for further testimony for the reasons that  
2 follow, I think ultimately, as it happened at the  
3 deposition, what was really in dispute were questions  
4 about Plaintiff's position on damages, what was the  
5 damages number. I think the right way to get that  
6 testimony -- or to get that information is to get it  
7 through contention interrogatories. I think questions  
8 like that are questions that Judge Robinson, in the  
9 past, has called "contention deposition topics," which  
10 are generally disfavored for reasons that I've  
11 suggested here.

12 And so I think really, what that  
13 dispute was about was whether Robocast had previously  
14 provided sufficient information in its contentions  
15 about their damages position. The best way to have  
16 gotten that information would have been the  
17 appropriate way to have sought more information by  
18 supplementation.

19 Today on this call, I think there's  
20 been a suggestion that, well, additionally or separate  
21 and apart from that, something in an expert report  
22 that was provided suggests that testimony from  
23 Mr. Smith may or may not have contributed to the  
24 expert's calculation of damages.

1                   Whether that's true or not true, it's  
2                   simply not part of the record I have. I can't be  
3                   making decisions on issues based on records I haven't  
4                   seen. And I need to make decisions because the  
5                   parties need to be moving forward with regard to these  
6                   issues. They have a chance to make the best record  
7                   they can.

8                   And so I don't have a basis for some  
9                   other reason to grant the request as to the issue of  
10                  what's Robocast's position on damages.

11                  With regard to the second issue, which  
12                  related to testimony about why Plaintiff didn't seek a  
13                  license from the defendant before the case was filed,  
14                  I'm going to deny that as moot in light of the  
15                  representations that have been made on this call. The  
16                  defendant has acknowledged that to the extent  
17                  Plaintiff is not going to attempt to rely, absent  
18                  opening the door, on any assertions about why a demand  
19                  letter was or wasn't set at trial, it will withdrawal  
20                  its request for further testimony. And so I think the  
21                  issue is moot there.

22                  With regard to the third issue about  
23                  valuation. I think it's -- I'm going to grant it in  
24                  part and deny it in part. With regard to questions

1 about information that Mr. Smith discussed, about that  
2 valuation that was provided between 2014 and 2016,  
3 which on redirect, it was established came from  
4 lawyers at Foley & Lardner, related to a fairness  
5 opinion as to which those lawyers were providing legal  
6 advice to the client. I think that the plaintiff has  
7 established the predicates to demonstrate that that  
8 information was protected by the attorney-client  
9 privilege.

10 Now on today's call, though it could've  
11 been raised in an earlier order, but it wasn't,  
12 Defendant has suggested that something about the fact  
13 that the information in that opinion was provided to  
14 Foley & Lardner by an entity called Dahl Consulting,  
15 in some way alters the idea that this could be  
16 attorney-client privileged communications.

17 As I said, I think the plaintiff made,  
18 in the briefing, a sufficient record to demonstrate  
19 privilege. I don't have enough information about the  
20 substance of that consultant's role to suggest that  
21 what seems to be the case, which is the information  
22 that's privileged, is not. Parties do work with  
23 agents in order to provide legal advice to clients.

24 So facially, at least based on what I

1 have, there's nothing that would sufficiently alter my  
2 view about the record Plaintiff has made on the issue.

3 And so I'll deny the request for  
4 further information about valuation as it relates to  
5 that particular report.

6 That said, the defendant says, "Look,  
7 we did want to ask, and we're asking Mr. Smith, about  
8 whether and to what other degree Robocast has  
9 information about the valuation of a share of the  
10 plaintiff that was -- that is or could be provided to  
11 investors."

12 On that front, I agree that the  
13 substance of the defendant's questions were getting to  
14 that issue, and were seeking that. And I think Mr.  
15 Smith's testimony suggested that he didn't have any  
16 information, or couldn't think of any information,  
17 about Robocast's share information that was provided  
18 to third parties.

19 And so because I think the defendant  
20 was fairly attempting to ask about that information,  
21 which would not be privileged -- at least there's no  
22 basis to believe it would be -- I think the defendant  
23 should get a chance to have a further 30(b)(6)  
24 deposition on the topic of Robocast's valuation of its

1 shares, to the extent that they were communicated to  
2 third parties outside solely the presence of  
3 communications with is counsel.

4 And so to the extent Plaintiff wishes  
5 to further reopen the 30(b)(6) deposition for that  
6 purpose, I'll grant the request. And the parties can  
7 discuss how that will work in the future.

8 All right. Let's try to move on here.  
9 The next issue, which is in the paragraph called  
10 "second" from the defendant --

11 MR. RIZZI: Your Honor, I apologize.  
12 Can I just get a clarification? I would submit that  
13 that information is largely going to come from the  
14 documents as opposed to Mr. Smith's memory and --  
15 we're happy to have him prepare on those documents,  
16 but can I just ask that Your Honor put a very short  
17 limit on the timeframe for that supplemental  
18 deposition?

19 THE COURT: Well, let's see what  
20 happens as we get through the rest of these issues,  
21 some of which additionally relate to testimony.

22 So -- okay. With regard to the issue  
23 about the clawback document, Ms. Fry, it looks like  
24 you're -- just for the record, you know, it appears

1 that the plaintiff is no longer claiming that this  
2 information is privileged. Is that your  
3 understanding?

4 MS. FRY: Yes, Your Honor. From the  
5 reply -- I'm sorry -- the opposition letter from  
6 Robocast.

7 THE COURT: Okay. And do we have -- I  
8 think -- can you remind me, what's the exhibit number  
9 for this -- for the document at issue?

10 MS. FRY: It's Exhibit J to Netflix's  
11 opening letter.

12 THE COURT: Okay. And I think the  
13 issue here is, you know, your assertion that among  
14 other things, this document is relevant because it  
15 speaks to the issue of damages? You should get to ask  
16 questions about it. And the other side's assertion  
17 is, "The document speaks for itself." Is that kind of  
18 how you see things playing out so far?

19 MS. FRY: Yes, Your Honor.

20 THE COURT: Okay. Anything you want to  
21 say about why you think that assertion is no good?

22 MS. FRY: So, Your Honor, documents do  
23 not supplant testimony. This is a document that the  
24 damages experts relied on in the prior litigation.

1 And on its face is not privileged, and as Your Honor  
2 noted, Robocast has withdrawn its privileged claim  
3 over it.

4 Now the document is highly relevant to,  
5 in particular, Robocast licensing strategy and its  
6 desire to obtain a precedent setting license to gain  
7 immediate revenue. That issue goes directly to  
8 Georgia-Pacific factor.

9 The number of Georgia-Pacific factors  
10 and to Robocast's desire to structure its royalty as a  
11 running royalty as opposed to a lumpsum.

12 Now whether Robocast wanted immediate  
13 revenue from licensing bears on whether it would  
14 prefer a lumpsum or a running royalty. That issue is  
15 something that the -- is relevant to the expert's  
16 decisions on how to structure royalty. And we were  
17 not -- Netflix was not allowed to ask any questions to  
18 Mr. Smith regarding the structure of the royalty based  
19 on this document.

20 And no, it's not before Your Honor, but  
21 Robocast's expert points to interviews with Mr. Smith  
22 regarding the structure of the royalty. And so this  
23 is another situation where Robocast has used privilege  
24 as a sword and the shield where Netflix was not

1 allowed to ask any questions regarding this document  
2 to Mr. Smith. Nonetheless, its expert's relying on  
3 information from Mr. Smith on this very topic.

4 And so we --

5 THE COURT: Okay.

6 MS. FRY: Oh, thank you, Your Honor.

7 THE COURT: Okay. I think I've heard  
8 enough there.

9 Ms. Talmage, they wanted to ask  
10 questions about this doc. Seems like it goes to  
11 damages. In the depo, there was an objection on  
12 privilege grounds. Even you all aren't suggesting  
13 that that's a valid objection any further.

14 You say that the doc speaks for itself,  
15 but you get to ask questions about documents in  
16 30(b)(6) depositions. That's what they're for. What's the  
17 company's view about what this means? Is there any  
18 basis not to permit further questioning about this  
19 document with regard to a 30(b)(6) witness?

20 MS. TALMAGE: Yes, Your Honor. The  
21 document -- Netflix itself admits in the second page  
22 of its opening letter brief that this document is  
23 simply consistent with what Robocast told potential  
24 licensees in its demand letters about the first-mover

1 advantage, and cites an additional document that  
2 corroborates that.

3 And I apologize to bring up this expert  
4 report again, but Netflix's expert cites this document  
5 and gleans exactly that from it, and does not indicate  
6 that any additional information's needed to understand  
7 its contents or how it relates to damages in this  
8 case.

9 It just seems like insisting on keeping  
10 a resolved dispute alive at this point.

11 THE COURT: Okay. Fair enough. I  
12 don't need any rebuttal questioning.

13 So on this issue, I'm going to grant  
14 the request for further 30(b)(6) testimony. The  
15 document for all the reasons Defendant says seems  
16 relevant at a minimum to damages issues in the case.  
17 The witness should have been permitted to answer  
18 questions about it, instead, an objection for  
19 privilege was made that isn't viable.

20 And so it, too, will be among the  
21 categories of information that a further 30(b)(6)  
22 deposition can address. Okay. And reasonable  
23 questions relating to it and the answers given.

24 Okay. The third category here, kind of

1     like a -- it's like a hodgepodge of stuff that is said  
2     to overall relate to the substance of -- or subject of  
3     business meetings and activities related to  
4     investments, perspective investments, and fundraising.

5             Okay. Ms. Fry, I had to break it down.  
6     Here's what I thought was being discussed or still at  
7     issue with regard to this third bucket. It seems like  
8     maybe three categories.

9             Category one is information about a fee  
10    arrangement between the plaintiff and Foley. Category  
11    two seems like it'd be about questions about business  
12    meetings relating to proposed investments, including  
13    the identity of any litigation funders. And category  
14    three seemed to be about questions -- testimony  
15    relating to Mr. Rizzi's involvement in reviewing  
16    investor materials and maybe related issues.

17            Do I have it right in terms of what's  
18    kind of at issue with regard to your third category?

19            MS. FRY: Yes, Your Honor.

20            THE COURT: Okay. Let's just talk  
21    about them then. Again, we'll try to be focused here.

22            Category one, fee arrangement between  
23    the plaintiff and Foley. I think the defendant is no  
24    longer claiming that subject matter is privileged, but

1 I think it is asserting that the info's not relevant.  
2 Whereas I think you're saying you think it is relevant  
3 to "how much Robocast netted from the prior cases  
4 after paying counsel when Robocast cites the licenses  
5 to show its success."

6 Is that how this is playing out here?  
7 Is this a dispute about relevance about this --  
8 questions about this information?

9 MS. FRY: I believe so, Your Honor. I  
10 agree Robocast appears to have withdrawn its privilege  
11 assertion over the existence of the fee arrangement.  
12 They are saying that the amount Foley & Lardner was  
13 paid following the prior settlement agreements is  
14 irrelevant, but we -- as Netflix put in its letter  
15 briefing to you at the court, those issues bear  
16 directly on damages.

17 Robocast prevented Netflix from  
18 obtaining testimony as to how much Robocast netted  
19 from prior cases after paying its counsel, where  
20 Robocast has touted those same agreements to its  
21 investors. And so I think Netflix is entitled to  
22 probe those inconsistencies that Robocast has taken  
23 with its investors and the facts of the amount of  
24 money it actually earned from those prior agreements,

1 which it's now in expert discovery seeking to distance  
2 itself from. And that all bears on the calculation of  
3 the reasonable royalty in this case.

4 And so, again, the threshold for  
5 relevance is not an incredibly high burden here. And  
6 so this is something that Netflix should be allowed to  
7 explore through 30(b)(6) deposition testimony as it  
8 does bear on damages, and there are no privilege  
9 assertions over it.

10 THE COURT: I just need to better  
11 understand what you're talking about. So is what  
12 you're saying, "Look, Robocast had prior cases in  
13 which the patents in suit were asserted," or related  
14 patents?

15 MS. FRY: So, Your Honor, Robocast had  
16 two prior cases in which one of the patents in suit  
17 that's at issue in this case was asserted, and was the  
18 only one that had issued at the time of those prior  
19 litigations.

20 THE COURT: Okay. So they've got some  
21 prior cases where at least one of the patents here was  
22 asserted.

23 MS. FRY: Correct.

24 THE COURT: And they settled the

1       litigations; is that right?

2                       MS. FRY:   Yes, Your Honor.

3                       THE COURT:   And they got an amount of  
4       money for that settlement.   And the amount of money is  
5       said to be relevant to damages issues in this case; is  
6       that right?

7                       MS. FRY:   Yes, Your Honor.

8                       THE COURT:   And you know the amount of  
9       money that they got from the settlements, but what you  
10      don't know is how much related to attorneys' fees and  
11      how much they had to pay their lawyers out of that  
12      money.

13                      And so what you're saying is you need  
14      to understand what the fees were so you can understand  
15      what nonfee payments were made to get a better sense  
16      of the value of those settlement agreements?

17                      MS. FRY:   Correct, Your Honor.   We want  
18      to understand what Robocast earned after paying its  
19      counsel.   We do know that they were not able to pay  
20      back their investors on the amount of money that they  
21      netted, only its executives and its lawyers made any  
22      money from those agreements.   We want to understand  
23      the breakdown there.

24                      THE COURT:   Okay.   Let me pause on that

1 then and turn to Plaintiff's counsel.

2 Ms. Talmage, are you taking these as  
3 well?

4 MS. TALMAGE: Yes, Your Honor. Thanks.

5 THE COURT: So what's your response  
6 there?

7 MS. TALMAGE: Yeah. My response is  
8 that Netflix's own exhibits contain plenty of  
9 information about Robocast's fee arrangement. For  
10 example, Exhibit P, at page three, discloses that  
11 investors were not paid back from those settlements.  
12 And we've also produced profit and loss statements  
13 that include line items for legal fees, including  
14 contingency fee arrangements, which Netflix's damages  
15 expert has since relied on and included as exhibits to  
16 his report.

17 And we still --

18 THE COURT: Can I just stop you there?  
19 Just to make sure I'm understanding.

20 MS. TALMAGE: Sure.

21 THE COURT: So page three of that  
22 exhibit talks about settlements with Microsoft and  
23 Apple; is that right?

24 MS. TALMAGE: Yes, Your Honor.

1 THE COURT: Okay. And is your side or  
2 the defendant's side so far in this case relying on  
3 the value of those settlements as being relevant to  
4 damages?

5 MS. TALMAGE: We have -- we are not  
6 relying on those as comparable to -- for damages  
7 purposes. Netflix's expert is.

8 THE COURT: Is relying? Okay. And are  
9 you saying that there's somewhere in the record where  
10 it's otherwise clearly asserted how much of the monies  
11 paid to -- from those entities to Plaintiff in turn  
12 went to pay Plaintiff's attorneys' fees?

13 MS. TALMAGE: Yes, Your Honor. Profit  
14 and loss statements that we've produced include that  
15 information. And we still don't --

16 THE COURT: So essentially you're  
17 saying that if the questions were asked about this, it  
18 would be cumulative to other information that's  
19 already clearly in the record?

20 MS. TALMAGE: Yes, Your Honor. In  
21 addition to being irrelevant to damages.

22 THE COURT: Why irrelevant? Why  
23 wouldn't it speak to, you know, if the settlements are  
24 said to be indicative of value, why wouldn't taking

1 out attorneys' fees help to get to more of the core of  
2 what the IP itself was worth?

3 MS. TALMAGE: Because the  
4 counterparties to those settlements didn't decide what  
5 to pay based on what Robocast attorneys would  
6 ultimately receive. It has no bearing on the actual  
7 ideas of values of the patents or the value of using  
8 those patents.

9 THE COURT: And in showing me that it's  
10 cumulative, did you point me in your letter to the  
11 place in the record that clearly indicates what's, you  
12 know -- what's the number for fee --

13 MS. TALMAGE: -- that we have provided  
14 that. And I apologize for that oversight.

15 THE COURT: Okay. Fair enough. Okay.

16 Ms. Fry, back to you. It's asserted,  
17 nevertheless, that somewhere in the record we do know  
18 what the amount of monies paid to counsel were with  
19 regard to these settlement payments. You already have  
20 that. What's your response to that?

21 MS. FRY: So, Your Honor, Robocast did  
22 not include that information in its letter or pointed  
23 us to that during Mr. Smith's or Mr. Torres'  
24 deposition on this topic. Rather, they blocked the

1 questions for privilege, not as cumulative of  
2 information in the record.

3 And again, documents do not supplant  
4 testimony on this topic.

5 And I'll also note that Ms. Talmage  
6 pointed Your Honor to Exhibit P to Netflix's opening  
7 letter, but this is one example where Robocast touted  
8 its prior settlement agreements to its investors, and  
9 how much they were -- in a way so that they could  
10 secure new investors.

11 And so this is another situation where  
12 the amount of actual revenue earned from those prior  
13 agreements is relevant to damages, and to the  
14 representations to investors.

15 THE COURT: Okay. But just to be  
16 clear, are you saying -- when Ms. Talmage says that  
17 the amount of fee payments relating to these two  
18 settlements is in the record. You're saying, like, "I  
19 don't know what they're talking about. Not as far as  
20 we know"; is that right?

21 MS. FRY: That's correct. I mean, I  
22 haven't seen them pointing to -- Netflix to specific  
23 P&L statements from specifically the 2014 to 2016 time  
24 period in which Robocast earned any revenue from prior

1 license agreements. So it's unclear to us how this  
2 could be cumulative of information in the record.

3 THE COURT: Okay. All right. So with  
4 regard to this issue, I'll grant the request for  
5 further testimony. First, with regard to the  
6 substance. I think the defendant has made a showing  
7 that the information can be relevant. It's undisputed  
8 that the defendant is pointing to payments relating to  
9 these two settlement agreements as being a relevant  
10 component to damages here.

11 And although neither side provided any  
12 case law, it does strike me that understanding  
13 information relating to those components, including  
14 how much of that payment was ultimately allocated  
15 towards attorneys' fees, an issue not asserted to be  
16 privileged or work product protected, can possibly be  
17 relevant to an understanding of what the value of  
18 those settlements were.

19 And then additionally, to the extent  
20 that Plaintiff argues that the testimony would be  
21 cumulative because there is some place in the record  
22 where the information sought is adequately disclosed  
23 in a matter that wouldn't require further questioning.  
24 I don't have that before me. It wasn't provided.

1 Could've been, but wasn't. And so therefore, I'll  
2 grant the request with regard to this additional  
3 category.

4 Okay. Let me talk about category two,  
5 and that relates to seems like questions about  
6 business meetings relating to proposed investments in  
7 Plaintiff and the identity of litigation funders.

8 Ms. Fry, to you. Again, it looks like  
9 here the defendant is no -- or the plaintiff is no  
10 longer claiming privilege, but it's arguing lack of  
11 relevance. And it says, in part, "To the extent we're  
12 talking about investor communications, we've provided  
13 all information about investor communications," at  
14 least documents I suppose.

15 So we're just focusing on these  
16 meetings relating to investors. Is your view we may  
17 have got docs, but we'd like to ask questions about  
18 what happened during those meetings?

19 MS. FRY: Your Honor, I would actually  
20 like to clarify one point about the litigation funders  
21 and communications with investors and funders.

22 We do not have those communications as  
23 Ms. Elliott pointed out earlier. We understand that  
24 those are in the form of emails or saved to a database

1 called MailChimp, which is not emails, but is a  
2 service that -- where a company can input information  
3 to then create an email that goes out to multiple  
4 recipients.

5 And so Mr. Rizzi made the point earlier  
6 that Netflix somehow took the position that email  
7 discovery was inappropriate. That's not true.  
8 Netflix's position that email discovery from Netflix  
9 has -- is unduly burdensome and not relevant given  
10 that Judge Andrews, earlier in this case, dismissed  
11 claims of willfulness and inducement.

12 So I just wanted to clarify the record  
13 as to what Netflix has and does not have with respect  
14 to communications with investors. We do not have all  
15 the communications with investors.

16 With respect to --

17 THE COURT: Can I just ask on that  
18 point --

19 MS. FRY: -- of funders --

20 THE COURT: I'm sorry to interrupt. I  
21 want to make sure I understand. It was asserted I  
22 think by Plaintiff's side that both parties agreed  
23 that no email would be provided. That we just weren't  
24 going to have email discovery. You're saying no?

1 What we agreed to is that the defendant wasn't going  
2 to provide email?

3 MS. FRY: Just to clarify, Your Honor.  
4 Correct that we disagree with how Robocast has  
5 characterized the record, but no in the sense of the  
6 parties reached an agreement on emails. Rather the  
7 parties earlier in this case disagreed as to the scope  
8 of email discovery. And Netflix took the position  
9 that email discovery was relevant from Robocast, would  
10 be unduly burdensome from Netflix because the court  
11 dismissed willfulness and inducement. So there were  
12 no pending live issues from which emails would have  
13 relevance.

14 Now Robocast has not pushed further  
15 from email discovery from Netflix, but Netflix has  
16 always maintained that emails from Robocast are  
17 relevant. And have asked Robocast to produce emails  
18 given that through these depositions and through  
19 Ms. Ianuzzi's document production, we learned that  
20 there are highly relevant communications with  
21 third-party investors in the form of emails.

22 And so this is subject matter that  
23 we've asked for targeted requests from Robocast based  
24 on information we learned from a third party, and

1 through depositions of Robocast witnesses.

2 THE COURT: Okay. In any event, what's  
3 at issue here is testimony. And I guess in my mind,  
4 am I wrongly -- I'm thinking of on the one hand,  
5 what's being sought here could be testimony about  
6 communications with what I'm calling investors. On  
7 the other hand, communications with what I'm calling  
8 litigation funders.

9 Am I right to be thinking of those as  
10 two separate categories of kind of business-related  
11 communications, or do you think of them as all one?

12 MS. FRY: It is hard to see how  
13 Robocast is drawing the line between investors and  
14 litigation funders. I think we can treat them all in  
15 one as business-related communications, Your Honor.

16 THE COURT: Okay. And then to  
17 understand the argument about relevance, so I mean,  
18 presumably, not every aspect of a communication with a  
19 potential funder is necessarily relevant to claims or  
20 defenses at issue in the case; right? I mean, if  
21 they're talking about what they're going to have for  
22 lunch, that's not relevant. But if they're --

23 I think I understand your focus to be  
24 if the discussion is on the value of Robocast's IP,

1 particularly the intellectual property at issue in  
2 this case, and it relates to that, then we think it is  
3 relevant to damages; is that correct? And is there  
4 anything more you want to say to flush out your  
5 damages-related relevance argument?

6 MS. FRY: Yes, Your Honor.  
7 Communications with investors and litigation funders  
8 as to the patents at issue here are highly relevant to  
9 damages and alleged commercial success. They go to  
10 the value of the patents, the perceived strengths and  
11 weaknesses of those patents.

12 The identities of funders is also  
13 relevant, and there's been no assertion that that's  
14 protected by work product or attorney-client  
15 privilege. And so that's where the -- Netflix tried  
16 through its questioning Ms. Frantom, one of Robocast's  
17 executives, and Mr. Torres. Asked them for the  
18 identities of the funders with whom they have  
19 communicated and sought money, and were blocked either  
20 on the grounds of relevance, which is improper under  
21 Rule 30, or blocked on the ground of attorney work  
22 product, but had pointed to no case that supports  
23 blocking the identity of a funder. That is log-level  
24 information. It should've been provided through a

1 privilege log, at a minimum.

2 And so in addition to relevance of  
3 litigation funding communications, investor  
4 communications, the identities of the funders is not  
5 protected by work product. And it also goes to the  
6 issue of witness bias. Who has a financial interest  
7 in the outcome of this case? Is it one of the third  
8 parties we have subpoenaed? Is it someone else? We  
9 don't have that information and it does bear on  
10 witness bias and witness credibility, Your Honor.

11 THE COURT: With regard to damages  
12 though, you mentioned commercial success is another  
13 factor. The plaintiff has said on this call that it  
14 is not making an objective indicia argument as to  
15 commercial success for other than, like, a couple  
16 years back in the early 2000s.

17 And so I guess I'm wondering if that's  
18 true, how could commercial success be a relevance  
19 argument?

20 MS. FRY: Oh, so, Your Honor, we also  
21 learned through Robocast's witnesses that the products  
22 that they were developing and alleged to have made  
23 revenue on in the early existence of the company are  
24 the same sort of line of products that they have not

1     been able to earn any revenue on today.

2                     So it's not just the pre-2000 timeframe  
3     that Robocast is pointing to as relevant to commercial  
4     success. It's the entire span of the company's  
5     existence regarding these products that have not  
6     substantively changed. At least what we understood  
7     from their lawyers.

8                     So information on a product's  
9     commercial success post-2020 is relevant. But also  
10    Georgia-Pacific factor eight for damages, all about  
11    Robocast's profitability and commercial success.  
12    Which again is not limited to their products pre-2020.  
13    That's success from licensing. That's success from  
14    post-2020 sales.

15                    And so that, Your Honor, in addition to  
16    obviousness, is relevant -- the commercial success is  
17    relevant to Georgia-Pacific factor eight for damages  
18    as well.

19                    THE COURT: When you say "commercial  
20    success," I just want to make sure I understand what  
21    you're saying or what you're talking about.

22                    Like, say the plaintiff is having a  
23    conversation with a potential funder of litigation.  
24    And the funder said -- and there's a conversation

1 about, "Well, how much do we think this patent is  
2 worth? How much do we think the value of the patent  
3 could be in litigation against, you know, a  
4 defendant?" Or, you know, if there's a conversation  
5 about what do we think is the strength of the patent  
6 vis-a-vis validity issues? You know, there's a way of  
7 talking about the value of the patent. Its value.  
8 What could be recouped in a suit against an entity  
9 like Netflix.

10 I mean, I think I understand the  
11 assertions that to the extent there's a reasonable  
12 inference that such conversations likely would've  
13 happened, that could be relevant to damages issues.

14 You are making that assertion; am I  
15 right?

16 MS. FRY: Yes, Your Honor.

17 THE COURT: But beyond that, I'm just  
18 trying to figure out when you say, "Well, information  
19 about commercial success," what do you mean beyond  
20 what I've just described? And I should say I would so  
21 far describe these as -- I'm trying to think about if  
22 I were to permit testimony, but if I weren't to  
23 necessarily agree that, like, every conversation with  
24 an investor or litigation funder is in its entirety

1 necessarily relevant, but I'm trying to figure out if  
2 the relevant material that's potentially in there, the  
3 value of the IP -- questions that go to the value of  
4 the IP in this litigation. I understand the relevance  
5 assertion there.

6 Is there something more you're talking  
7 about when you say "commercial success"?

8 MS. ELLIOTT: May I jump in just  
9 briefly, Your Honor? If I may.

10 THE COURT: Sure.

11 MS. ELLIOTT: And not that Ms. Fry  
12 needs any help here, but I did take the deposition of  
13 Mr. Torres. I think one point is important which is  
14 the narrowing that Mr. Rizzi spoke of as to what --  
15 their claims of commercial success, we have not seen  
16 in their papers, in their documents, or  
17 correspondence. That's the first time I'm hearing of  
18 this narrowing.

19 Moreover, I asked Mr. Torres in  
20 deposition exactly what Your Honor's querying about.  
21 I said, "Do you think your company's been successful?  
22 And if so, how so?" And the two things he cited was  
23 his product and the litigation successes.

24 He touted the success they derived from

1 being able to get money from Microsoft and Apple and  
2 Vevo. And all of that is information that they are  
3 also communicating to investors. In fact, Mr. Rizzi  
4 presented to investors touting these very same  
5 principles and datapoints of commercial success.

6 And in doing so, he received questions.  
7 There was a Q&A period in one of those webinars where  
8 investors are asking the very questions that we are  
9 asking because this is our right to assert this  
10 defense at trial, that in fact this company was not  
11 successful.

12 And what they're claiming to be a  
13 commercial success to the extent that they're  
14 referencing litigation results, the only people who  
15 make money are the lawyers. That is something we  
16 should be able to explore in discovery and tell a  
17 jury. And to be blocked by that with privilege  
18 instructions and other failure to product documents is  
19 precisely why we're here today.

20 THE COURT: And I guess, Ms. Elliott,  
21 if I were to rule that I think questions relating to  
22 communications with investors, you know, actual or  
23 potential investors, or actual or potential litigation  
24 funders, to the extent the questions have some tie to

1 the issue of the value of the patents in suit in this  
2 case would be appropriate. And that was the  
3 instruction I gave.

4 Would that be an appropriate guidance  
5 from your perspective?

6 MS. ELLIOTT: I do think, Your Honor,  
7 that's appropriate. To the extent they're relying on  
8 those two elements that Mr. Torres testified to, their  
9 product development and any so called success of  
10 products, and their value of their IP, which is what  
11 they're mostly leaning on, that's fair game in our  
12 view.

13 THE COURT: Okay. All right. Thank  
14 you. Let me turn to Plaintiff's counsel.

15 So, Ms. Talmage, on this issue, if I  
16 could make the inference -- a reasonable inference  
17 based on the record I have, that if the plaintiff has  
18 had communications with investors or potential  
19 investors, including litigation funders or potential  
20 litigation funders, and that I could make the  
21 inference that it is likely or reasonable that in  
22 those communications, there would be discussion of --  
23 one way or another -- of the value of the patents that  
24 are in suit in this case. If I were to conclude,

1 look, I think questions about that subject matter at  
2 least. Questions with regard to these third parties  
3 about the value of intellectual property at issue in  
4 this case is fair game. What would be wrong with that  
5 kind of conclusion?

6 MS. TALMAGE: I would just respond that  
7 those questions have been asked and answered. The  
8 portions of deposition testimony that Netflix points  
9 to in its letters despite kind of going into document  
10 discovery now and all sorts of other things, show that  
11 the questions were about what legal advice they  
12 received on draft communications before they were sent  
13 out to investors.

14 And we've provided in Exhibits 5 to 14  
15 examples of testimony elicited about communications to  
16 investors. We've provided documents. Netflix may not  
17 be thrilled with the consequences of their position  
18 against email discovery, but just to correct that  
19 point, Robocast has never understood that limits on  
20 email discovery would be a one-way street. And  
21 there's plenty of case law that discovery from a  
22 defendant is much more important than discovery from a  
23 plaintiff in patent litigation.

24 THE COURT: I'm going to make no

1 decision today about whether email discovery of some  
2 type or another should be permitted. I don't have any  
3 clue what the parties' agreement was or wasn't. This  
4 is only about 30(b)(6) testimony. So --

5 MS. TALMAGE: Okay.

6 THE COURT: I understand you want to  
7 put your view on the record. I just want to tell you  
8 that in case it helps you.

9 MS. TALMAGE: Sure. Absolutely. So I  
10 will leave that point there.

11 And it seems now that counsel for  
12 Netflix is contending that commercial success after  
13 the year 2020 is somehow relevant, but the patents  
14 expired in 2020. And again, the parties have agreed  
15 that discovery post expiration of the patents is not  
16 relevant.

17 THE COURT: Well, I'm just looking at  
18 the transcript portions that were highlighted by the  
19 other side; right? Because that's all that I have is  
20 what they've told me about what's really at issue  
21 here.

22 And, like, one is a conversation with  
23 Mr. Torres about a term sheet for a \$10 million  
24 investment. The other was questions to Ms. Frantom

1 about the identity of a litigation funder. The third  
2 was some of the testimony from Mr. Robertiello in his  
3 deposition appeared to relate to conversations about  
4 round B fundraising or investments. I have objections  
5 made in each case.

6 Aren't those questions and lines of  
7 questioning that could well have gotten into the  
8 testimony about what was discussed or communicated  
9 with regard to these issues about the patents and the  
10 value of the patents?

11 MR. RIZZI: Your Honor, if I could just  
12 jump in quickly, and Ms. Talmage can correct me if I'm  
13 wrong. I believe there's already testimony in the  
14 record to the effect that there was no discussion of  
15 the value of the cases, or the value of the patents,  
16 or what amount might be recovered from any litigations  
17 with respect to any potential investors or investment.

18 THE COURT: But again, like, you know,  
19 these are -- I think you're talking about testimony in  
20 30(b)(1) depositions. This is a 30(b)(6) deposition. And do we  
21 have 30(b)(6) deposition testimony about that?

22 MR. RIZZI: I believe so, and I'll let  
23 Ms. Talmage correct me in terms of confirm that, in  
24 terms of who was actually designated on those topics.

1 I think it was Mr. Smith.

2 MS. TALMAGE: I believe it would've  
3 been Mr. Smith. And I am not aware of any places  
4 where we have blocked that testimony with a privilege  
5 instruction concerning information actually provided  
6 to third parties and not legal advice on draft  
7 communications.

8 And I would just point out also that  
9 the documents that Netflix has relied on as examples  
10 of these highly relevant allegedly communications to  
11 damages are email blasts to investors that give  
12 general contours of the litigation and the patents.  
13 And there's no reason to think that there's been  
14 anything more specific than that. And if it has,  
15 we've produced it.

16 THE COURT: Ms. Talmage, I'm sorry to  
17 interrupt, but just to get to what's before me. Like,  
18 again --

19 MS. TALMAGE: Yes, Your Honor.

20 THE COURT: -- like, the first thing  
21 that the other side teed up was questions to  
22 Mr. Torres about a term sheet for a \$10 million  
23 investment. It sounds like somebody was investing  
24 money in the plaintiff.

1 MR. RIZZI: Your Honor, I can clarify  
2 that. That was a litigation funding term sheet, and  
3 that was the reason. And again, I would submit we  
4 need to keep separate regular investors and  
5 discussions with litigation funders. So that was -- I  
6 was at that deposition and that was the reason for the  
7 instruction there, is we maintain that, you know,  
8 litigation funding is -- should be completely off  
9 limits here. It's not relevant to anything. It's  
10 outside the scope of the agreed 2020 cutoff on  
11 discovery. And it's only going to create a whole host  
12 of privilege fights and needless disputes that are not  
13 relevant to anything in this case.

14 THE COURT: I guess, Mr. Rizzi, with  
15 regard to litigation funding, are you asserting the  
16 only litigation funding communications that were had  
17 are post-2020, and that the parties have agreed that  
18 no discovery from that time period is permitted?

19 MR. RIZZI: I would say certainly the  
20 only communications that resulted in an actual  
21 agreement with a funder are post-2020.

22 THE COURT: Okay. But I'm not limiting  
23 myself to that. We could have discussions about value  
24 of IP and conversations that don't relate to -- you

1 know, don't end up in an agreement.

2 MR. RIZZI: Agreed. And I can't  
3 represent that there weren't prior discussions that  
4 may have taken place, you know, as is common with  
5 potential litigation funders.

6 But again, you know, those would've all  
7 been subject to nondisclosure common interest  
8 agreements, work product protection, and with the same  
9 restriction on no discussion of amounts, value of the  
10 patents, or prospects of what could be recovered in  
11 litigation.

12 MS. ELLIOTT: Your Honor, may I respond  
13 just briefly to that?

14 THE COURT: Just one second, Ms.  
15 Elliott.

16 MS. ELLIOTT: Okay.

17 THE COURT: Because, Mr. Rizzi, I'm  
18 focused on relevance because -- unless I'm  
19 misremembering. In your letter -- in your responsive  
20 letter, when we were talking about these issues, did  
21 you assert that a reason why information may not be  
22 provided about litigation funding was a work product  
23 basis or a privilege basis?

24 MR. RIZZI: I believe we did, both

1 relevance and work product based on, you know, at  
2 least Judge Hall's decision, which Ms. Talmage can  
3 provide you with the cases.

4 MS. TALMAGE: That's ELM 3DS  
5 Innovations LLC v. Samsung. Civil action number 1430  
6 at docket number 372.

7 THE COURT: Okay. And, Ms. Talmage,  
8 I'm just looking at your letter.

9 MS. TALMAGE: Yes.

10 THE COURT: Because, you know, again,  
11 the part where you are responding. There's a  
12 paragraph that starts regarding questions on page two,  
13 on Robocast business meetings, et cetera. Netflix  
14 mischaracterizes the depositions in amidst that  
15 Robocast has maintained that information related to  
16 litigation funding, including efforts to secure it,  
17 are not relevant and not discoverable.

18 And so I'm looking in here for where --  
19 I see we think they're not relevant. Where is there a  
20 privilege or work product objection that's being made  
21 with regard to litigation funding communications?

22 MS. TALMAGE: Fair enough, Your Honor.  
23 It does not come through clearly in that portion of  
24 the papers.

1 THE COURT: And didn't otherwise,  
2 like -- in the privilege log issue was that, like,  
3 there's stuff logged about lit funding that's -- it's  
4 logged, but it's logged not as privilege or work  
5 product, but just as not relevant; right? Like, isn't  
6 in the 25 --

7 MS. TALMAGE: Right. Yes, Your Honor.  
8 Our major concern with litigation funding is that it  
9 is not relevant. There could be documents in that  
10 subset that are also work product, but our main  
11 consideration all along is that it's not relevant.  
12 And this court has even characterized discovery into  
13 litigation funding as gambling. And I could pull the  
14 citation up for you.

15 THE COURT: Hasn't Judge Andrews though  
16 also gone on to say, "Look, there could be  
17 circumstances in which discussions about value of the  
18 IP could well be relevant if they were had in the  
19 context of discussions with litigation funders"? Am I  
20 misremembering that or didn't any other cites -- to  
21 that case say that?

22 MS. TALMAGE: Courts have certainly  
23 split on this issue, and some judges do believe that  
24 there are circumstances where it may be relevant. And

1 I would submit to you that the case for relevance here  
2 is based on speculation. And we don't think that you  
3 need to review the documents to be able to realize  
4 that, but if you'd like to, we're prepared to provide  
5 them in camera.

6 THE COURT: Okay. But can I also ask,  
7 now you might say, like, well, with a party that makes  
8 a bunch of products, et cetera, occasionally has  
9 litigation; you know? How relevant or how likely is  
10 it that they're having discussions about the value of  
11 their patents and how central is that to the nature of  
12 the discussions? How likely is it to infer that  
13 that's going to happen?

14 But with the plaintiff who I gather is  
15 not making any products, its whole business is about  
16 licensing or litigating patents, it could be said it's  
17 more likely conversations about the value of the IP  
18 might be had with regard to these litigation funding  
19 communications. What would be wrong with that  
20 inference?

21 MS. TALMAGE: I would just note that  
22 while Robocast has not earned revenue from products in  
23 recent years, it is still very much engaged in  
24 research and development, and developing products, and

1 trying to find an angel for its business to flourish  
2 outside of litigation. So to characterize them as  
3 solely in the business of litigation is not quite  
4 accurate.

5 And I would just submit that to the  
6 extent that information is in any communications with  
7 funders, it's also in communications that we have  
8 produced, including to investors, including internal  
9 discussions. I mean, we've produced thousands of  
10 pages of documents and I haven't heard anything from  
11 Netflix that they're actually missing that is  
12 essential to their damages, or even would add color  
13 beyond what they have already asserted.

14 THE COURT: Okay. Fair enough.

15 All right. Ms. Fry, is there anything  
16 more you want to say with regard to this  
17 communications with investors and/or litigation  
18 funders issue?

19 MS. FRY: I'll just add, Your Honor,  
20 that Robocast has taken the position that its products  
21 practice the patents. So communications with funders  
22 and investors regarding its products also sheds light  
23 on the value of the IP that is practiced by those  
24 products. I just wanted to note that as well.

1 THE COURT: Didn't we agree that they  
2 haven't had products for, like, 15, 20 years or  
3 something?

4 MS. FRY: They have attempted multiple  
5 relaunches of their products, and Ms. Talmage did just  
6 state that they have products under development, but  
7 they have taken the position that their products do  
8 practice their patents.

9 THE COURT: Okay.

10 MS. ELLIOTT: Your Honor, may I just  
11 briefly respond to just a couple points that Plaintiff  
12 has made?

13 THE COURT: Yes, Ms. Elliott.

14 MS. ELLIOTT: First, I just want to  
15 direct the court to the Leader Techs v. Facebook case.  
16 That's a 2010 District of Delaware matter where the  
17 court found that privilege does not apply to  
18 communications concerning litigation funding  
19 arrangements, particularly before a deal's consummated  
20 or with potential investors.

21 Also note that it is black letter law  
22 that the only basis to instruct a witness not to  
23 answer is for privilege. And here, we have admissions  
24 from counsel in this proceeding and in the context of

1 the privilege law dispute that Your Honor has before  
2 the court, that Robocast has consistently blocked  
3 discovery on relevance grounds. And specifically has  
4 instructed witnesses not to answer on relevance  
5 grounds, which is wholly inappropriate under Rule 30,  
6 Rule 37, and is the reason why we are seeking  
7 testimony for this subject matter.

8 I think it's more than reasonable to  
9 infer, Your Honor, that when you have a business  
10 that's solely being touted for its success in  
11 generating licensing revenue, while admitting that  
12 it's struggling to produce a product that earns any  
13 revenue, that an investor who's going to invest  
14 hard-earned money, whether it's \$35,000 from Mr. Rizzi  
15 or \$10 million from a funder, would want to know what  
16 is the value of this IP and how -- will I get a return  
17 on that investment and when.

18 Those are without a doubt reasonable  
19 discovery for us to get in something that would be  
20 covered by the communications under these  
21 circumstances.

22 I'll pause there, Your Honor. I know  
23 your time is short.

24 THE COURT: Okay. Thank you.

1 MR. RIZZI: Your Honor, can I just very  
2 briefly make one point?

3 THE COURT: Very quickly.

4 MR. RIZZI: The litigation funding at  
5 issue here is I believe entered in 2022. And again,  
6 this is another instance where there's a double  
7 standard here. Netflix itself took the position that  
8 nothing post-2020 was even relevant in this case.  
9 They refused to produce anything post-2020.

10 I know that's not before you, but  
11 that's just another reason why none of this litigation  
12 funding material, you know, should be relevant or  
13 discoverable.

14 THE COURT: Okay. Thank you.

15 MS. ELLIOTT: Your Honor?

16 THE COURT: I have to cut it off there.  
17 I'm sorry.

18 Okay. So with regard to this issue,  
19 let me state the following. First, nothing that I  
20 say -- to the extent that the parties have an  
21 agreement, that certain categories of discovery should  
22 not be sought, like for example, if it is the case  
23 that the parties have mutually agreed that information  
24 relating to the -- and that could potentially relate

1 to the case after a certain date is not going to be  
2 pursued or provided by both sides. Nothing that I say  
3 is meant to interfere with prior agreements about the  
4 parties about the scope of discovery, temporal or  
5 otherwise.

6 But within the possible scope of  
7 discovery, with regard to this issue, I'll order as  
8 follows. And that is I'll grant the request in part  
9 for additional testimony, to the extent that the  
10 questions have some tie to the subject matter of  
11 communications with actual or potential investors  
12 and/or actual or potential litigation funders  
13 regarding the value of the patents at issue in this  
14 litigation.

15 So again, the general topic within the  
16 realm of the parties' prior agreements with regard to  
17 discovery. That information can be pursued in a  
18 further deposition regarding the issue of  
19 communications with actual or potential investors or  
20 litigation funders, to the extent that the questions  
21 can be fairly said to get to discussions about the  
22 value of the intellectual property at issue in this  
23 case.

24 I think that if such communications

1     were had, the defendant has -- demonstrated why it  
2     could bear on and be relevant at least to the issue of  
3     damages, the reasons they've set out in their papers.

4             I understand the case law that writ  
5     large in all circumstances, you know, courts are  
6     hesitant to suggest that all or any discovery about  
7     litigation funding, for example, is necessarily fair  
8     game.

9             But I think under the circumstances of  
10    this particular case, particularly, we have a  
11    plaintiff who I think at least it's undisputed that  
12    their primary business, if not a sole business for  
13    many of the years in question, has been focused on  
14    licensing and litigating patents. It's a fair  
15    inference that in meetings with actual or potential  
16    investors or litigation funders, that there may well  
17    have been discussions that bear in some way on the  
18    value of the intellectual property at issue in this  
19    case. And that kind of subject matter does seem like  
20    it could be relevant, at a minimum, to the issue of  
21    damages.

22            It could also potentially be relevant  
23    to other liability issues in the case, but at a  
24    minimum, the damages as well. I think that it is fair

1 game for Defendant to be able to ask those questions.

2 Relatedly, to the extent that I, with  
3 regard to a privilege log dispute, am asked to review  
4 certain documents that were logged because they  
5 implicate communications about litigation funding. I  
6 think it would be appropriate for those kind of  
7 communications to be produced if they relate to the  
8 subject matter that I've just described. That is  
9 communications about the value of the IP in this case.

10 And so I'll grant the request for  
11 further testimony in that regard, and otherwise deny.  
12 The other parties may have to --

13 But again, this is going to be a  
14 deposition. So as Ms. Elliott said, as long as  
15 there's a good faith basis to ask a question, even if  
16 there's a view that it's not relevant or goes beyond  
17 the relevance sphere, the question can be asked and  
18 answered. You know, in that scenario, you understand  
19 that counsel are going to make good faith decisions to  
20 attempt to stay within the confines of the court's  
21 order. Could be disagreements about whether a  
22 question goes beyond that scope. An objection could  
23 be made in that regard, but the question will be asked  
24 and answered. And only if the defendant's side

1 thought that the questions were so beyond the scope of  
2 the court's order, that some further relief should be  
3 granted could be raised in the future. So that's my  
4 decision with regard to this issue.

5 Let me just briefly tell you, in the  
6 trial, I'll ask if you have any objection to this.  
7 With regard to the remaining subject matter of your  
8 motion, the last category in the third category really  
9 seems to relate to Mr. Rizzi's involvement in certain  
10 subject matter. My thought, in light of the fact that  
11 I'm going to assume make a decision about the  
12 relevance and/or appropriateness of discovery with  
13 regard to requests related to Mr. Rizzi and his role,  
14 that I should deny without prejudice to renew this  
15 dispute until I resolve the motion to quash issue.  
16 And then parties can see what the court's decision is  
17 there. I suspect it'll have great relevance with  
18 regard to this issue.

19 And then lastly, with regard to what's  
20 in the privilege log-related disputes here, my  
21 suggestion was going to be that, administratively, as  
22 a separate motion -- I'll have the parties file a  
23 one-page motion -- that I ask the plaintiff to provide  
24 me with the 25 documents that you've identified at

1 issue. I would give the plaintiff a chance if they  
2 wished to make any other record by way of declaration  
3 as to their privilege assertion or work product  
4 assertion with regard to a doc. Then I would review  
5 the material and make a decision as to whether or not  
6 I thought it should be produced. Would you have a  
7 dispute with me addressing the remainder of the issues  
8 that way?

9 MS. FRY: No objection in the way you  
10 propose, Your Honor. I just want to ask one question  
11 for clarification because appendix one to Netflix's  
12 reply letter included the 89 documents that Brett  
13 Smith -- that were logged in Robocast's privilege log.  
14 And that Netflix has sought production, not in camera  
15 review.

16 And so I just wanted to see if Your  
17 Honor had a ruling on that issue or would like -- or  
18 that was encompassed within your order regarding in  
19 camera review.

20 THE COURT: Well, I think, like, isn't  
21 it true also that some of your 25 documents in your  
22 list implicated Smith-related communications that  
23 would -- I guess what I was thinking is I think some  
24 of those 25 involve communications where it's Smith's

1 involvement on the communication is asserted to be the  
2 only reason as to why the communication could be  
3 privileged.

4 And so, like, I was thinking that the  
5 plaintiff would have to tell me, among other things,  
6 like, you know, why it is -- you know, provide  
7 sufficient record to demonstrate, like, you know, is  
8 this communication happening between 2017 and 2019 or  
9 otherwise? And if it is happening from 2017 to 2019,  
10 like, you know, why is he a lawyer providing legal  
11 advice during that time. And then I might be able to  
12 resolve all the matters that way. Do you disagree?

13 MS. FRY: I think that approach seems  
14 reasonable, Your Honor. Appendix one and two, they're  
15 supposed to be mutually exclusive. The 89 documents  
16 in appendix one were set aside as the Brett Smith 2017  
17 to 2019 documents. The in camera review 25 documents  
18 do include Brett Smith's name on them, but they're  
19 undated. Such that we don't know if it falls within  
20 that time period, Your Honor. So I just wanted to  
21 clarify that point.

22 THE COURT: All right. Well, let me  
23 ask Plaintiff's counsel briefly.

24 Who's addressing these remaining

1 issues? Who's addressing the privilege log issue for  
2 Plaintiff?

3 MS. TALMAGE: That's me, Your Honor.

4 THE COURT: Okay. So, Ms. Talmage, the  
5 gist in the letters was, look, Smith's not a lawyer  
6 giving legal advice between 2017 and 2019. So any doc  
7 where it's on the privilege log where his  
8 participation's said to be the reason why it's  
9 privileged can't be because he's not a lawyer giving  
10 legal advice. They say appendix one are those docs.

11 Do you have any dispute there? Do you  
12 have a reason to dispute that appendix one, those docs  
13 shouldn't be produced?

14 MS. TALMAGE: Yes, Your Honor. So I  
15 think it really comes down to some metadata confusion,  
16 at least for the documents where Brett Smith is an  
17 author.

18 So the vast majority of ESI we've  
19 collected and produced in this case came from a sort  
20 of project management platform called Basecamp, which  
21 preserves metadata only as of the last edit and not  
22 when the document was created. It is not the best at  
23 preserving authorship necessarily.

24 But I have gone through each of these

1 documents with Mr. Smith, and we can submit a  
2 declaration from him if that would be appropriate.  
3 But the documents in which he's an author were  
4 authored in part at least by him while he was still at  
5 Robocast providing legal advice. And subsequent edits  
6 may have changed the date that appears on the log, but  
7 they don't change the fact that he was involved in the  
8 preparation of those documents.

9 And documents -- some of the documents  
10 that we've identified as work product based on being  
11 done at the direction of Brett Smith, and based on his  
12 advice to prepare for litigation, Mr. Smith has  
13 confirmed with me that he's provided direction and  
14 assignments to Robocast employees before his departure  
15 that they acted on after he departed and before he  
16 came back.

17 THE COURT: I'm just -- I'm sorry. I'm  
18 just trying to understand what you're saying. Are you  
19 saying that, you know, they pulled out these docs and  
20 said, "Look, these are all from 2017 to 2019," and  
21 Smith seems to be the reason for the privilege  
22 assertion. But you're saying that due to some  
23 metadata issue, they're really not all from 2017 to  
24 2019?

1 MS. TALMAGE: They are from 2017 to  
2 2019, but they include content added by Brett Smith  
3 before that date. So all we have is the date that it  
4 was last edited, not the date it was originally  
5 created.

6 THE COURT: Okay. Have you talked to  
7 the other side about this metadata issue and how it  
8 impacts appendix one?

9 MS. TALMAGE: No, we have not. And  
10 that may have been oversight on our part. But we also  
11 were not -- did not really meaningfully discuss the  
12 date issue before these papers were submitted.

13 THE COURT: Okay. So, look, here's  
14 what I would say. On the remaining issue in the third  
15 category with regard to Mr. Rizzi's communications,  
16 I'll deny that request without prejudice to renew.  
17 Because it seems to me that my future forthcoming  
18 decision about the motion to quash issue will probably  
19 shed great light on the resolution of that issue. And  
20 if for some reason after I make that motion to quash  
21 decision there's still some unresolvable dispute as to  
22 this subcategory, it could always be brought back and  
23 raised. My hope is it won't.

24 With regard to the privilege log

1 issues, first, with regard to appendix one and what  
2 Ms. Talmage is saying, the parties should further meet  
3 and confer. Because they haven't. The defendant's  
4 hearing what Ms. Talmage is saying for the first time  
5 apparently, and they're not on the same page as to  
6 what's going on with those documents.

7 And what I'll do is I'll review 25 docs  
8 in camera, but they should be inclusive of all the  
9 issues that are raised in the briefing. And it does  
10 seem like maybe, after you further meet and confer,  
11 it's not going to be as neat as, well, every doc in  
12 appendix one is said to be from 2017 or 2019, or not,  
13 or what.

14 So maybe the parties in that meet and  
15 confer can figure out how to include some subset of  
16 those appendix one documents as part of a set of 25 so  
17 that I can resolve maybe that issue representatively.

18 In the near term, I'll commit to you,  
19 I'll try to resolve in camera privilege, work product,  
20 or lit funding disputes with regard to 25 docs as a  
21 representative sample to be able to give the parties  
22 guidance.

23 But I need you to get me a universe  
24 that is no larger than that. And it sounds like

1 appendix one is not going to be easily separatable  
2 out, so I'll ask you to meet and confer further,  
3 figure out a process which you can get me -- here's  
4 the 25 docs. Here are -- to the extent that Plaintiff  
5 seeks to add anything to the record about the basis  
6 for a privilege or work product assertion as to those  
7 docs, they can -- that way declaration or otherwise,  
8 they can do it. And then some instructions can be  
9 provided to me as to the subcategories of issues that  
10 I'm looking at as to each -- as to the various 25  
11 docs. That's what I would ask you to do.

12 So if I were to ask you to further meet  
13 and confer to see if you can come up with a plan for  
14 that and report back to me, say, no later than seven  
15 days from today's date.

16 Ms. Fry, does that seem reasonable to  
17 you?

18 MS. COHEN: Your Honor, this is Rachel  
19 Cohen. Good afternoon. Sorry I haven't had the  
20 chance to speak more today. I also represent Netflix  
21 and I've been a party to all of the correspondence and  
22 the meet and confers on this issue. It has been going  
23 on for six months. We have received five different  
24 iterations of their privilege log, each time with

1 things changing and moving around.

2 We've had multiple meet and confers.  
3 This is the first time this is being addressed for the  
4 court, and it's the first time it's being addressed to  
5 us. It's this type of ongoing moving target,  
6 everchanging descriptions, rationale, reasons.

7 The last iteration of this, we said we  
8 were going to go to the court. There were no more --  
9 there was nothing else to discuss. And they did not  
10 oppose -- they did not contend there was any reason  
11 why the mid-2017 to the mid-2019, where Mr. Smith  
12 testified under oath that he was not representing  
13 Robocast in this case. He was not offering any legal  
14 advice. And all of those 89 documents, after they've  
15 had five chances of getting this right and assured us  
16 they were going document by document to ensure that  
17 the descriptions were in fact accurate, they have  
18 never contended those are work product. They've never  
19 contended the dates on those are incorrect. They have  
20 just admitted that those documents were just  
21 Mr. Smith's documents and should be produced. They've  
22 never challenged that. And we submitted the appendix  
23 one to show which are affected by that particular  
24 issue, and then separate the ones that are under

1 dispute, which we really do appreciate the court  
2 taking the time to review those in camera given the  
3 longstanding dispute between the parties that have  
4 needlessly multiplied these proceedings.

5 THE COURT: Okay. Ms. Cohen, I need  
6 solutions though, not argument. So what is your  
7 solution to this problem? Did I just rule for you and  
8 say, "Appendix one docs go to you"? Is that the idea?

9 MS. COHEN: Well, I think the appendix  
10 one documents really haven't been challenged as being  
11 anything other than documents that were created in a  
12 period where there was no attorney-client  
13 relationship.

14 And the only claim of privilege as it  
15 relates to those documents is attorney-client  
16 privilege. So if they're now coming in at the  
17 eleventh hour, after having multiple opportunities to  
18 meet and confer together, having multiple  
19 iterations -- five iterations of their privilege log.  
20 And we did send the court redlines that we put  
21 together of all the different changing descriptions,  
22 that should be produced.

23 And if they have some reason why they  
24 need to move for a protective order, why certain of

1 those documents really should've been marked privilege  
2 from the outset, then they should -- the onus should  
3 be on them to establish privilege. That's their  
4 burden. One that -- only they have access to those  
5 documents, but they should've made that showing months  
6 ago, not at this stage, Your Honor.

7 THE COURT: Okay.

8 MS. COHEN: And then as it relates to  
9 the second set, we do appreciate Your Honor taking the  
10 time to look at those. And they're representative of  
11 the issues we've seen.

12 THE COURT: Okay.

13 Ms. Talmage, just, you know, what about  
14 the assertion we're just hearing about, this date  
15 problem for the first time now. Should've heard about  
16 it well before, et cetera.

17 MS. TALMAGE: If you review the  
18 extensive back-and-forth we've had on these issues,  
19 that Ms. Cohen represents have been going on for  
20 months, the date issue is a very recent addition, and  
21 reflective of the constantly evolving complaints that  
22 we have tried to address with the iterations of our  
23 privilege log.

24 And just if you look at some of the

1 track changes in Netflix's exhibits, I think Ms. Cohen  
2 is trying to imply that there's some nefarious attempt  
3 to shield documents that should be produced. And a  
4 lot of these are -- one of them was a formatting mix-  
5 up that, you know, it's embarrassing and it's not  
6 great to do, but it's not attempting to hide anything,  
7 and we corrected that as soon as we were aware of it.

8 Another iteration was that Netflix's  
9 insistence to take off documents that we've produced,  
10 even though they are aware of what's been produced.  
11 So we did that.

12 THE COURT: Ms. Talmage, let me just --  
13 they raised in their opening letter brief. Smith's  
14 not a lawyer from 2017 to 2019. You in your  
15 responsive brief said zero about that issue. You even  
16 had some extra space, but you said nothing about it.  
17 They in their reply said, "Hey, it's undisputed."  
18 2017 to 2019, he's a lawyer -- he's not a lawyer. So  
19 here's the docs that that impacts.

20 I guess what's the assertion? Like,  
21 yeah, we don't quarrel that if a doc was created  
22 relating to Smith from 2017 to 2019, there's no  
23 privilege assertion? But we're asserting that every  
24 single document in appendix one, which they only

1 attach to their reply brief, isn't that? And every  
2 single one of them was created or relates to stuff  
3 Smith did other than in that 2017 to 2019 timeframe?

4 MS. TALMAGE: Yes, Your Honor. That is  
5 the assertion. And I think in our opposition letter,  
6 we didn't address the date issue directly. And again,  
7 I apologize for that. We should have, obviously. But  
8 we've -- we extensively discussed the reasons why the  
9 documents that we are withholding are properly  
10 privileged or work product.

11 And not withstanding that they may have  
12 been subsequently edited after legal advice was  
13 included in them by Brett Smith while he was counsel  
14 for Robocast.

15 THE COURT: Okay. So here's what we'll  
16 do. And I'll try to -- I'm saying this on the record,  
17 so I'm just extemporaneously saying it, but I'll try  
18 to be clear enough.

19 Okay. So what we will do is I'm going  
20 to consider this privilege log issue to be one that's  
21 not part of the live, prior discovery dispute motion  
22 that's been raised. Because it needs additional work  
23 from me and I didn't have the ability to resolve it  
24 before this call because I didn't have the docs.

1                   So what I'm going to do is I'll  
2     consider the disputes regarding Defendant's motion to  
3     have been resolved. But with regard to this privilege  
4     log issue, I'll ask the parties to do the following.

5                   First, I want them to further meet and  
6     confer, and no later than one week from today, report  
7     back to me ideally with an agreement about how they  
8     can put before me no more than 25 representative  
9     documents that I can review in camera relating to the  
10    issues raised in the final part of Defendant's brief.

11                  And that will include the various  
12    issues that were said to be teed up by the 25 docs  
13    Defendant identified in their appendix two. But  
14    you'll have to cut out a couple because included in  
15    this submission -- it's going to be no more than 25  
16    docs. I'm not going to review any more than that, but  
17    I'll need to have at least a couple that is also  
18    representative about this issue that's arisen here  
19    with regard to appendix one. That is are certain of  
20    the documents listed in appendix one, although they  
21    were asserted to have a date between 2017 and 2019.  
22    There's an assertion that nevertheless, that doesn't  
23    convey the full reality of why it is that they're  
24    protected by privilege or work product.

1                   And the idea is that the plan's going  
2     to be -- 25 docs. So it's basically going to include  
3     almost all the docs that are in the current 25 in  
4     appendix two, but there'll have to be some culling  
5     because we'll need to have a couple that'll tee up the  
6     issue that's now been raised about appendix one.

7                   And I think it's appropriate to include  
8     appendix one in there because on the one hand, I agree  
9     with Defendant that Plaintiff has waived any argument  
10    that a document created by Mr. Smith or created and  
11    then sent to and from him in the 2017 to 2019 period  
12    is privileged or otherwise protected by work product.

13                  Now because Defendant made the  
14    assertion that it was in their opening brief, and the  
15    plaintiff didn't respond, but it was only in the reply  
16    brief that Defendant identified the exhibits in  
17    appendix one that they thought amounted to these.

18                  And Plaintiff asserts that it has an  
19    argument that because of the metadata issue, what is  
20    included in that appendix are documents that include  
21    communications relating to counsel in some way that  
22    predate that 2017 to 2019 time period.

23                  I'll need to decide whether that's so,  
24    and a good basis for permitting discovery as to those

1 docs were not. If I'm going to do that relatively  
2 soon, that'll attempt to resolve that issue.

3 So no later than a week from today, I'd  
4 like the parties to give me a status report about  
5 whether they've come to an agreement on how I can tee  
6 this up.

7 And again, the thing I'm thinking of is  
8 we have 25 docs that represent all the issues that  
9 Defendant was raising, including this appendix one  
10 issue, that are representative. I'd have a submission  
11 date by which the plaintiff would give me those  
12 documents. And I'd allow the plaintiff to add, if  
13 they wish to, a declaration that would provide any  
14 further support for their privilege or work product  
15 assertions that isn't otherwise evident from the face  
16 of the documents themselves. And then I would review  
17 and resolve. And that's how I would resolve these  
18 privilege issues.

19 Ideally, when they report back to me a  
20 week from today, the parties would have agreed on the  
21 process, and would simply tell me when they're going  
22 to be making the relevant submission.

23 If for some reason in that report,  
24 there's not a total agreement, I can figure out any

1 issue I need to figure out, but I'm really asking you  
2 to try to get together to do that so I can get this  
3 done in that time.

4 Okay. So I'll look for something  
5 further from the parties -- in a week from today. And  
6 when I get a new submission of these 25 docs, I'll  
7 also be asking the parties to jointly file a one-page  
8 discovery dispute motion that'll appropriately say on  
9 the record, "This is a new dispute that you can now  
10 resolve, Judge, about these 25 privileged documents --  
11 or assertedly privileged documents"; okay?

12 So that's how we'll resolve that issue,  
13 which is the remainder of the issues discussed in  
14 Defendant's letter.

15 All right. I got a 2 o'clock call that  
16 I need to further prepare for.

17 There's one further that was raised.  
18 This is an issue raised by Plaintiff. I know a  
19 newer -- it's about the deposition. I know a newer  
20 attorney was going to argue it, and so I want to give  
21 that counsel a chance to make an argument, but I have  
22 to keep this brief because I got to finish preparing  
23 for that 2 o'clock call.

24 And so who's going to be addressing

1 this issue for Plaintiff's side?

2 MR. JOHNSON: That would be me, Your  
3 Honor. Grant Johnson.

4 THE COURT: Okay, Mr. Johnson.

5 And who's going to be addressing this  
6 issue for Defendant's side?

7 MS. COHEN: Me, Your Honor. Rachel  
8 Cohen.

9 THE COURT: Okay. All right. So I  
10 know Plaintiff's counsel is said to be a newer  
11 attorney. I want to try to provide at least a brief  
12 chance for some argument here.

13 And so, Mr. Johnson, let me turn to you  
14 with regard to this dispute. And so it's Ms. Ponce  
15 who is at issue here. And I guess an initial question  
16 to you is, you know, one of the gripes the defendant  
17 has is, although the original discovery period was  
18 supposed to end on April 11th, you guys didn't notice  
19 Ms. Ponce's deposition, or any other depositions,  
20 until very late in the game -- March 27th. How come  
21 you did that?

22 MR. JOHNSON: Your Honor, I think the  
23 record in that case is fairly clear. So there was a  
24 whole dispute regarding how depositions were going to

1 go forward in that case, including regarding Netflix's  
2 failure to coordinate with Google. At that time, in  
3 light of that, it became fairly evident that an  
4 extension of discovery of some sort was going to be  
5 necessary.

6 Robocast noticed its depos when it was  
7 able and sure to do so within the fact discovery  
8 period, nonetheless.

9 THE COURT: So essentially what you're  
10 saying is everyone kind of understood by late March  
11 that at least there was going to be -- that was the  
12 dispute; right? Whether the discovery schedule's  
13 going to get pushed back. It wasn't, like, agreed to;  
14 right?

15 MR. JOHNSON: No, it wasn't agreed to,  
16 but it was clear from -- given how many depositions  
17 that were going to need to be done, as well as the  
18 factual discovery that remained outstanding, that that  
19 was going to be somewhat necessary. And that's what  
20 the court ultimately did is granted a month -- or I  
21 believe it was a five-week extension of the discovery  
22 period.

23 And that I was, I believe, necessary to  
24 go -- the case both because of Robocast's depositions,

1 but also because of the noticed depositions by  
2 Netflix, as well as the third-party subpoenaed  
3 depositions.

4 THE COURT: But was it possible that  
5 Judge Hall would say, "No, I'm not going to extend the  
6 deadline," at the time in which you issued these  
7 notices on March 27th?

8 MR. JOHNSON: Of course. Judge Hall of  
9 course had total discretion to do that. Nonetheless,  
10 that is why Robocast did notice those depositions  
11 within two weeks of the close of fact discovery as,  
12 you know, was considered reasonable under the  
13 applicable case law.

14 Ultimately though --

15 THE COURT: So you all -- so,  
16 Mr. Johnson, you all had -- you all were, like, aware  
17 of the reality that you noticed all these depositions  
18 on the 27th of March. They might have to all be  
19 completed by April 11th if Judge Hall doesn't agree  
20 with you about the extension. I mean, could they have  
21 been reasonably completed by then?

22 MR. JOHNSON: So, I mean, obviously  
23 Robocast was aware that was a potential outcome.  
24 Obviously if that had -- Judge Hall had not extended

1 discovery, Robocast would've done its utmost to ensure  
2 that all the applicable depositions were scheduled as  
3 necessary.

4 THE COURT: Okay. What more do you  
5 want to tell me about your position on this issue?

6 MR. JOHNSON: Sure, Judge. So we  
7 really think that the -- this is a fairly simple  
8 issue. The fact is that Netflix received a duly  
9 noticed deposition notice for Ms. Helen Ponce, and  
10 Netflix declined to comply with that deposition  
11 notice.

12 Ultimately, everything before the  
13 court's extension of the April 5th discovery deadline  
14 is ultimately beside the point for this dispute. The  
15 fact is that the court extended discovery for five  
16 weeks. Netflix had in hand a valid deposition notice.  
17 And immediately after Judge Hall extended the  
18 discovery schedule, Robocast reached out to Netflix  
19 and sought to schedule all of the depositions that  
20 would need to be had -- occur within the short  
21 remaining period to occur.

22 Netflix refused to participate in those  
23 discussions despite repeated attempts by Robocast to  
24 ensure it occurred. Instead, Netflix insisted on

1 scheduling each one of its noticed depositions within  
2 the first two weeks of the remaining fact discovery  
3 period.

4 Robocast largely acquiesced to that  
5 decision, including the scheduling of the depositions  
6 of Mr. Joseph Sofer, Mr. Gregory Andrew, which  
7 occurred over four days. That schedule was agreed to  
8 on April 9th.

9 It was only on April 10th, after those  
10 depositions were scheduled, that Netflix informed  
11 Robocast that Ms. Ponce would be available exclusively  
12 on April 17th. Robocast immediately reached out and  
13 asked for clarification about whether or not she would  
14 be a 30(b)(6) witness. Netflix declined to answer  
15 that email.

16 Netflix then, on April 15th, released  
17 Ms. Ponce and indicated that they would not be  
18 producing her in discovery. There's no precedent for  
19 that kind of unilateral decision to release a witness,  
20 particularly in light of Robocast's repeated offers of  
21 compromise to accommodate the witness' schedule,  
22 including out of time deposition.

23 THE COURT: And, Mr. Johnson, you know,  
24 one thing I know you say is let's not, you know, only

1 give one date for her depo, and we could not do it  
2 because the questioning attorney wasn't going to be  
3 available. And the other side says you guys proposed  
4 dates for a bunch of depos in this remainder of fact  
5 discovery period, and you only offered one date for  
6 them.

7 I mean, is what happened you offered  
8 one date and they took it, or did you offer one date  
9 and they said, "We can't do that one," and you said,  
10 "Well, you're not getting any other ones"? Or what's  
11 your response to that assertion about those four depos  
12 where you only offered one date?

13 MR. JOHNSON: Your Honor, where we  
14 offered one date, I believe the record reflects that  
15 Netflix accepted those dates. And where there were --

16 THE COURT: What if they had said,  
17 "Sorry, we can't do one of those"? There's a  
18 conflict.

19 MR. JOHNSON: Then Robocast would've  
20 worked with Netflix to schedule alterative dates.  
21 Frankly, it's what we did with respect to these third  
22 parties that our counsel also represent, and  
23 Mr. Sofer, Mr. Andrew, we had also allowed for a out  
24 of time deposition of Mr. Kenneth Hicks, who was also

1 a third party that counsel represented.

2 It simply never occurred to Robocast  
3 counsel that it was an option to simply refuse to  
4 schedule a deposition.

5 THE COURT: All right, Mr. Johnson.  
6 Anything further you want to add before I turn to your  
7 colleague on the other side?

8 MR. JOHNSON: Just to note that the  
9 fact that we were unable to depose Ms. Ponce was  
10 seriously prejudicial to Robocast's damages case.  
11 Ms. Ponce was the only witness identified in both the  
12 interrogatory responses and initial disclosures, with  
13 relevant information related to Netflix's revenue and  
14 costs. Both of which were key issues in the damages  
15 reports of Mr. Martinez and Mr. Holzen [ph], and  
16 doubtlessly would've also been -- Ms. Ponce  
17 doubtlessly would've also been the 30(b)(6) designee  
18 on three topics for which Netflix never designated any  
19 witness.

20 So the prejudice is clear to  
21 Robocast -- denied the ability to present a key part  
22 of its damages case.

23 THE COURT: Okay. Thank you.

24 Let me turn to the other side.

1                   Ms. Cohen, on your end, I understand  
2                   your gripe about when they noticed the depo, as well  
3                   as others. In the end though they say, "Look, you  
4                   offered one date. Said you don't like it, you know,  
5                   pound sand. She'll never be available again." And  
6                   they couldn't do the date, and you said, "Sorry. No  
7                   more deposition of Ms. Ponce" who they say is a fairly  
8                   relevant witness. Isn't that what happened?

9                   MS. COHEN: Your Honor, I think that's  
10                  not -- it's close, but it's not quite the full story.

11                  So to be clear, and I think the record  
12                  bears this out. It's a long and well-documented  
13                  history. And Judge Hall had the same question you  
14                  asked of Robocast counsel, Mr. Rizzi, and said, you  
15                  know, "Why did you wait so long? Was there any reason  
16                  why you couldn't serve any of these notices sooner?"  
17                  They waited until after they already moved to notice  
18                  the schedule to even notice any of our witnesses. And  
19                  all of the witnesses were served with a defective  
20                  notice.

21                  They could not -- I think they  
22                  recognize they couldn't actually complete those  
23                  noticed depositions by the April 11th deadline. And  
24                  the court recognized that and that's why we stipulated

1 to additional time of the close of fact discovery to  
2 allow for additional time to take all of the noticed  
3 depositions.

4 As it relates to Ms. Ponce, there is no  
5 dispute that Netflix identified Ms. Ponce as a  
6 relevant, and the only relevant witness as it relates  
7 to financial information in February of 2023. And  
8 repeatedly through the course of discovery through rog  
9 responses, ESI disclosures, production of her  
10 documents, and so on.

11 And then Ms. Ponce was the very first  
12 witness that either side identified for a deposition  
13 at all in this case. Any party deposition was  
14 Ms. Ponce. She was the very first person we  
15 noticed -- that was provided a date for, rather.

16 She was -- the date was provided one  
17 week before her deposition, and it was made very, very  
18 clear. Ms. Ponce had very limited availability left  
19 in the deposition in the period of fact discovery. If  
20 the deposition were to proceed, it needed to proceed  
21 on April 17th.

22 At that point, there was never a  
23 representation by counsel that they could not cover  
24 the deposition. They never said they weren't

1 available. They just said that they didn't have  
2 enough time.

3 And, Your Honor, this isn't enough time  
4 on a short runway. The accused functionality was  
5 introduced by Netflix in 2012. The patents expired no  
6 later than 2020. This lawsuit was brought in 2022 and  
7 we're talking about April of 2024.

8 There's no dispute that they had --  
9 they acknowledge they knew about Ms. Ponce and her  
10 relevance to this case and what information they had.

11 And as it relates to the experts in  
12 this case, as you have heard today, both sides have  
13 submitted expert reports. Netflix's expert has not  
14 relied on Ms. Ponce in offering his opinion in this  
15 case. And the information that they purportedly, if  
16 they needed it, they had ample opportunity to take her  
17 deposition.

18 So what we said is not that you can  
19 never have her. We said if you want to take her  
20 deposition, you should seek leave of the court. We  
21 understood Judge Hall's order to allow a limited  
22 extension of time, but that she expected the parties  
23 to get the depositions done in that window. She  
24 recognized that trials occur in less than time.

1                   And we proceeded with haste. We  
2                   expected Robocast to do the same. Unfortunately, they  
3                   elected, for whatever strategic choice, not to take  
4                   that deposition. They had 11 attorneys on their side  
5                   who could've taken that deposition, only one was tied  
6                   up in a deposition on a third-party matter in the  
7                   Google case, not in our case.

8                   So, Your Honor, we submit that if the  
9                   really couldn't have done it, the response should've  
10                  been that they couldn't do it. They didn't say they  
11                  couldn't do it because the answer is what they said,  
12                  which is they just didn't feel like they had enough  
13                  time. After this long record, that is lack of  
14                  diligence. That is not showing good cause justice  
15                  Judge Hall recognized.

16                  THE COURT: Okay. And on the notice  
17                  issue, I see that you noticed two depositions. The  
18                  Frantom deposition and the Robertiello deposition on  
19                  March 5th. Not March 27th, but March 5th. How long  
20                  had you all known about the relevance of those  
21                  witnesses?

22                  MS. COHEN: So if my memory serves me  
23                  correctly, Your Honor, Ms. Frantom and Mr. Robertiello  
24                  were not identified in the initial disclosures. They

1 were only identified as I think potential ESI  
2 custodians. A lot of the --

3 And to be clear, Your Honor, March 5th  
4 is more than a month of time before the April 11th  
5 close of fact discovery. We were ready, willing, and  
6 able to meet the fact discovery deadlines, which is  
7 what we told them when they first told us they needed  
8 an extension in February. Which is why we opposed the  
9 extension.

10 We said, "We are ready, willing, and  
11 able to complete the deadlines in this case. We are  
12 ready to proceed," and they sat. And they waited.  
13 And you know what? They didn't notice any of the  
14 Netflix's 30(b)(1) or 30(b)(6) depositions until two  
15 weeks before the April 11th close of fact discovery.  
16 That is representative of lack of diligence. That's  
17 why Judge Hall presumably found that they lacked good  
18 cause to extend the schedule for the three and a half  
19 months that they requested.

20 And she only, I believe, gave an  
21 extension of time at all because the reality was that  
22 it wasn't possible to do the 30 noticed depositions in  
23 six days, which is all the parties had remaining.

24 But she also cautioned that she

1 expected the parties to work together to get this  
2 done. And rather than tell us that they couldn't do  
3 it because they didn't have coverage, they just said  
4 it wasn't enough time. They had a week's notice and  
5 they said -- a week's notice after filing this case in  
6 March of 2022. That's more than two years to get  
7 their selves together on the witness they now contend  
8 is a critical witness for their damages case.

9 THE COURT: Okay. But for Frantom and  
10 Robertiello, you said they were ESI custodians. Were  
11 they identified as ESI custodians, like, pretty close  
12 in time to March 5th, or, like, many, many, many  
13 months before, or something in-between?

14 MS. COHEN: My understanding is they  
15 were disclosed as ESI custodians in September, but  
16 that there were no documents that were provided for  
17 Mr. Robertiello. So there wasn't actually, like, ESI  
18 particular documents that were produced that were his  
19 documents.

20 So it was more of a belts and  
21 suspenders, make sure we had all of the, you know,  
22 potential witnesses that would be potentially coming  
23 to trial, but not that there was a key missing  
24 document, because we didn't get any documents. We

1 would've assumed that if he were a crucial witness, we  
2 would've received documents for him, but we didn't  
3 receive those documents for him.

4 THE COURT: I take your point that you  
5 noticed all your depositions between January and March --  
6 early March, and they noticed all theirs in late  
7 March. That's what you're saying.

8 MS. COHEN: And we took their order  
9 seriously. To be clear, the majority of their  
10 witnesses were offered for one date. And even if that  
11 meant we had to dual track or even triple track, we  
12 made it happen and our team is half the size.

13 THE COURT: Okay. All right. Thank  
14 you.

15 Mr. Johnson, is there anything further  
16 you'd like to say by way of rebuttal?

17 MR. RIZZI: Your Honor, this is Steven  
18 Rizzi. I believe he may have dropped off somehow. I  
19 don't see him.

20 THE COURT: Oh, okay. All right.  
21 Well, as I said, I do need to wrap up. So, all right.

22 Well, I appreciate the arguments that  
23 were made here. In the end, I'm going to grant the  
24 plaintiff's motion and the plaintiff's going to be

1 able to take Ms. Ponce's deposition; okay? And I'll  
2 explain the reasons why very briefly.

3 I acknowledge, it's true, Plaintiff  
4 noticed the deposition and its other depositions late in the  
5 game. I understand Defendant's gripe about that.  
6 They noticed them on March 27th. The original  
7 discovery deadline was April 11th. That's very late.  
8 I get very difficult, if not impossible, to complete  
9 all those depositions between then and April 11th.

10 But ultimately, Judge Hall did extend  
11 the discovery deadline to May 13th. And so although  
12 Plaintiff was late, in some respects, Judge Hall has  
13 dealt with that issue and allowed a certain period to  
14 actually take the deposition.

15 So the real question is, you know, what  
16 was the process for taking the deposition, and was it fair  
17 to Plaintiff in this case?

18 And here, the defendant provided  
19 Ms. Ponce's availability on April 10th to the  
20 plaintiff. They said she was available on one date,  
21 April 17th. Was traveling and would not be available  
22 thereafter. That was the one day. Take it or leave  
23 it.

24 Plaintiff did respond and say that its

1 attorney who wasn't able to take the deposition, a  
2 conflict, or has told me that that was the case. But  
3 had responded and said that it asked some questions  
4 about the deposition, including whether she would be a  
5 30(b)(6) witness. Didn't get a response in the next  
6 few days, and ultimately said that the date did not  
7 work for them, and they told me now that the reason is  
8 because the lawyer who was going to handle the depo on  
9 that subject matter was not available on that one  
10 date.

11 And ultimately, look, it's -- you can't  
12 just offer one date and say, "Take this date," or not.  
13 At least as to a witness who has really relevant  
14 testimony. And, indeed, Defendant's letter, in the  
15 second paragraph of it, you know, makes the case as to  
16 why Ms. Ponce is relevant, and so does Plaintiff's  
17 letter.

18 And so, I mean, ultimately if the date  
19 didn't work, Defendant should offer at least one more.  
20 And Plaintiff should've tried to do it, but they  
21 didn't. And so Ms. Ponce's depo should be taken.

22 And in truth, frankly, this issue  
23 should've never got to my desk. You know, this depo  
24 should've been taken long ago.

1                   So I'm going to grant the motion and  
2                   the parties can discuss the scheduling of Ms. Ponce's  
3                   deposition. I'll trust that they'll do so amicably.

4                   With regard to the further 30(b)(6)  
5                   depo topics that I have ordered, you know, that sounds  
6                   like two hours maybe. Maybe a little more, maybe a  
7                   little less. I'm sure the parties can come to some  
8                   agreement on the relevant timeframe for the universe  
9                   of topics that I've discussed today that'll be  
10                  permitted for further depositions.

11                  All right. With that said, I've now  
12                  been at it for 3 hours and 45 minutes with the  
13                  parties. I really tried to give you as much of my  
14                  time as I possibly can, because I see the parties had  
15                  lots of disputes. And I've attempted to do as much as  
16                  I can to try to resolve as many as I can today.

17                  I've provided instructions for what  
18                  we'll do going forward in the future to try to get the  
19                  rest of the disputes resolved.

20                  That said, look for a further order  
21                  from me on the motion to quash. Otherwise, the  
22                  parties have instructions and I'll look forward to  
23                  hearing from them a week from today.

24                  With all that said, the court will end

1 our videoconference today and go off the record. I  
2 wish everybody a good day and a good week; okay? Take  
3 care.

4 MULTIPLE SPEAKERS: Thank you, Your  
5 Honor.

6 THE REPORTER: We are off the record at  
7 1:44 p.m.

8 (Whereupon, at 1:44 p.m., the  
9 proceeding was concluded.)

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CERTIFICATE

I, ANDREW WEADER, the officer before whom the foregoing proceedings were taken, do hereby certify that any witness(es) in the foregoing proceedings, prior to testifying, were duly sworn; that the proceedings were recorded by me and thereafter reduced to typewriting by a qualified transcriptionist; that said digital audio recording of said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

*Andrew Weader*

ANDREW WEADER

Notary Public in and for the  
Commonwealth of Pennsylvania

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JACOBEEY RADTKE

[&amp; - 26323]

Page 1

<b>&amp;</b>	<b>126</b> 89:8,10	<b>2008</b> 62:21	<b>2020</b> 25:21,24
<b>&amp;</b> 3:5 4:8,23	<b>128</b> 101:10	<b>2010</b> 61:20	26:1 28:5
7:23 8:2 20:5,6	104:13,20	152:16	60:12 137:9,12
32:3,24 61:14	<b>129</b> 101:10	<b>2011</b> 31:17	137:14 143:13
61:15 70:16	104:13	<b>2012</b> 184:5	143:14 146:10
88:10,14 90:18	<b>12:30</b> 8:14,16	<b>2013</b> 35:3	146:17,21
103:12 105:24	8:19	<b>2014</b> 85:17	154:8,9 184:6
109:5 115:4,14	<b>134</b> 85:10	88:4 115:2	<b>2022</b> 154:5
123:12	91:13	129:23	184:6 187:6
<b>0</b>	<b>13th</b> 73:18	<b>2014-2015</b>	<b>2023</b> 183:7
<b>00305</b> 1:8	189:11	108:20	<b>2024</b> 1:13
<b>08</b> 14:21 19:1,9	<b>14</b> 46:24 97:3	<b>2016</b> 85:17	184:7
<b>1</b>	101:10 142:14	88:5 115:2	<b>21</b> 89:10
<b>1</b> 8:11,12	<b>1430</b> 148:5	129:23	<b>212-402-9400</b>
144:20 186:14	<b>1498666</b> 35:4	<b>2017</b> 160:8,9,16	2:24
<b>10</b> 143:23	<b>15</b> 152:2	161:6 162:20	<b>22</b> 1:13
145:22 153:15	<b>15th</b> 179:16	162:23 163:1	<b>22-305</b> 6:24
<b>100</b> 16:11	<b>16</b> 109:15	164:12 166:11	<b>24</b> 6:20
35:17 93:15,19	<b>17</b> 104:20	169:14,18,22	<b>25</b> 69:15,22
<b>1000</b> 4:9	<b>17th</b> 179:12	170:3 171:21	70:2 149:6
<b>10001</b> 2:19	183:21 189:21	172:11,22	158:24 159:21
<b>106</b> 6:20	<b>19801</b> 1:18 2:7	<b>2019</b> 160:8,9,17	159:24 160:17
<b>10:03</b> 1:14 6:3	3:8	161:6 162:20	164:7,16,20
<b>10th</b> 179:9	<b>1:22</b> 1:8	162:24 163:2	165:4,10 171:8
189:19	<b>1:44</b> 192:7,8	164:12 166:11	171:12,15
<b>11</b> 185:4	<b>2</b>	169:14,18,22	172:2,3 173:8
<b>11th</b> 175:18	<b>2</b> 174:15,23	170:3 171:21	174:6,10
177:19 182:23	<b>20</b> 89:10 152:2	172:11,22	<b>25386</b> 193:17
186:4,15 189:7	<b>2000</b> 62:20	<b>202-350-5131</b>	<b>257</b> 83:22
189:9	137:2	4:17	84:13
<b>120</b> 47:11	<b>20004</b> 4:10	<b>202-637-2329</b>	<b>258</b> 83:22
<b>121</b> 3:16	<b>2000s</b> 136:16	4:15	<b>26</b> 73:12,15
<b>124</b> 85:10	<b>2001</b> 62:11,20	<b>202-637-2629</b>	74:10 76:22
91:13	<b>2007</b> 93:22	4:16	<b>26323</b> 194:14

## [27th - activity]

Page 2

<b>27th</b> 175:20 177:7,18 185:19 189:6 <b>28</b> 1:17	<b>37</b> 153:6 <b>372</b> 148:6 <b>395</b> 2:18 <b>3ds</b> 148:4	<b>6811211</b> 1:20	<b>abundantly</b> 57:8 <b>accept</b> 45:2 <b>accepted</b> 180:15 <b>access</b> 24:2 89:22 168:4 <b>accommodate</b> 179:21 <b>account</b> 26:22 67:19 94:24 <b>accountant</b> 102:21 <b>accurate</b> 56:23 151:4 166:17 193:9 194:5 <b>accusations</b> 60:7 <b>accused</b> 184:4 <b>acknowledge</b> 184:9 189:3 <b>acknowledged</b> 39:12 114:16 <b>acquiesced</b> 25:14 26:1 179:4 <b>acted</b> 59:11 162:15 <b>action</b> 1:7 6:19 6:24 148:5 193:12,16 194:8,12 <b>activities</b> 122:3 <b>activity</b> 34:9 47:20
		<b>8</b>	
		<b>844</b> 1:17 <b>89</b> 159:12 160:15 166:14	
<b>3</b> <b>3</b> 87:21 109:13 191:12 <b>30</b> 47:8,10 76:14 92:1 97:14 103:3 111:8 116:23 117:5 120:16 120:19 121:14 121:21 124:7 135:21 143:4 144:20,20,21 153:5 179:14 181:17 186:14 186:14,22 190:5 191:4 <b>302-498-7869</b> 3:12 <b>302-651-7705</b> 3:11 <b>302-655-5000</b> 2:10 <b>324</b> 85:20 87:21 <b>327</b> 85:20 87:21 <b>330</b> 109:15 110:18 <b>345</b> 93:22 <b>35,000</b> 153:14	<b>4</b> <b>4</b> 101:10 <b>400</b> 2:6 <b>408-621-9213</b> 3:19 <b>45</b> 47:10 191:12 <b>493</b> 93:22	<b>9</b>	
		<b>90s</b> 47:9 <b>920</b> 3:7 <b>95032</b> 3:17 <b>96</b> 31:10 <b>97</b> 31:10 <b>9th</b> 2:18 179:8	
		<b>a</b>	
<b>5</b> <b>5</b> 87:21 109:13 191:12 <b>30</b> 47:8,10 76:14 92:1 97:14 103:3 111:8 116:23 117:5 120:16 120:19 121:14 121:21 124:7 135:21 143:4 144:20,20,21 153:5 179:14 181:17 186:14 186:14,22 190:5 191:4 <b>302-498-7869</b> 3:12 <b>302-651-7705</b> 3:11 <b>302-655-5000</b> 2:10 <b>324</b> 85:20 87:21 <b>327</b> 85:20 87:21 <b>330</b> 109:15 110:18 <b>345</b> 93:22 <b>35,000</b> 153:14	<b>5</b> <b>5</b> 142:14 <b>50</b> 47:10 <b>50th</b> 2:18 <b>555</b> 4:9 <b>5th</b> 46:11 178:13 185:19 185:19 186:3 187:12	<b>a.m.</b> 1:14 6:3 <b>ability</b> 67:2 80:2 84:21,23 170:23 181:21 193:10 194:7 <b>able</b> 33:2 43:6 44:14 78:10 80:5 87:2 90:1 96:13 98:6 108:9,18 125:19 137:1 140:1,16 150:3 157:1 160:11 164:21 176:7 186:6,11 189:1 190:1 <b>absent</b> 114:17 <b>absolutely</b> 13:9 41:15 44:4,21 48:24 62:12 143:9	
		<b>6</b>	
		<b>6</b> 76:14 92:1 97:14 103:3 111:8 116:23 117:5 120:16 120:19 121:14 121:21 124:7 143:4 144:20 144:21 179:14 181:17 186:14 190:5 191:4 <b>600</b> 2:6 3:7	

[actor - alessandra.schaszberger]

Page 3

<p><b>actor</b> 63:12</p> <p><b>actual</b> 16:2</p> <p>44:14 45:16</p> <p>128:6 129:12</p> <p>140:22,23</p> <p>146:20 155:11</p> <p>155:12,19</p> <p>156:15</p> <p><b>actually</b> 21:12</p> <p>21:19 25:13</p> <p>32:5 37:10</p> <p>41:21,21 44:23</p> <p>49:15 59:5</p> <p>60:21 62:24</p> <p>70:4 75:3</p> <p>93:21 94:20</p> <p>101:11 123:24</p> <p>131:19 144:24</p> <p>145:5 151:11</p> <p>182:22 187:17</p> <p>189:14</p> <p><b>add</b> 12:14 31:4</p> <p>34:16 36:12</p> <p>39:19 58:16</p> <p>99:10 151:12</p> <p>151:19 165:5</p> <p>173:12 181:6</p> <p><b>added</b> 37:6</p> <p>163:2</p> <p><b>addition</b> 14:7</p> <p>50:4 127:21</p> <p>136:2 137:15</p> <p>168:20</p> <p><b>additional</b> 13:5</p> <p>37:8 43:20</p>	<p>69:24 88:24</p> <p>89:20 91:17</p> <p>97:1 100:4</p> <p>107:18,19</p> <p>121:1,6 131:2</p> <p>155:9 170:22</p> <p>183:1,2</p> <p><b>additionally</b></p> <p>6:21 113:20</p> <p>117:21 130:19</p> <p><b>address</b> 7:17</p> <p>24:15 30:12</p> <p>56:21 71:1,3</p> <p>121:22 168:22</p> <p>170:6</p> <p><b>addressed</b></p> <p>166:3,4</p> <p><b>addressing</b></p> <p>70:21 159:7</p> <p>160:24 161:1</p> <p>174:24 175:5</p> <p><b>adequately</b></p> <p>130:22</p> <p><b>administrative</b></p> <p>8:9</p> <p><b>administrativ...</b></p> <p>158:21</p> <p><b>admissions</b></p> <p>152:23</p> <p><b>admits</b> 120:21</p> <p><b>admitted</b> 50:24</p> <p>51:1 58:4</p> <p>166:20</p> <p><b>admittedly</b></p> <p>21:13</p>	<p><b>admitting</b></p> <p>153:11</p> <p><b>advantage</b></p> <p>121:1</p> <p><b>advice</b> 21:9,20</p> <p>22:10 26:10,11</p> <p>26:14 82:20</p> <p>88:21 89:13</p> <p>93:24 94:1</p> <p>100:8 106:5,6</p> <p>106:18 109:7</p> <p>110:5 115:6,23</p> <p>142:11 145:6</p> <p>160:11 161:6</p> <p>161:10 162:5</p> <p>162:12 166:14</p> <p>170:12</p> <p><b>advise</b> 26:11</p> <p><b>advised</b> 13:12</p> <p><b>advisement</b></p> <p>49:24</p> <p><b>advising</b> 19:20</p> <p>106:15</p> <p><b>advisor</b> 48:9</p> <p><b>affected</b> 166:23</p> <p><b>affiliated</b> 43:2</p> <p>53:6</p> <p><b>afternoon</b></p> <p>165:19</p> <p><b>agency</b> 110:12</p> <p><b>agent</b> 22:6</p> <p>110:5,5,20</p> <p><b>agents</b> 115:23</p> <p><b>ago</b> 46:24</p> <p>168:6 190:24</p>	<p><b>agree</b> 24:9 25:4</p> <p>63:21 116:12</p> <p>123:10 138:23</p> <p>152:1 172:8</p> <p>177:19</p> <p><b>agreed</b> 25:21</p> <p>28:6 63:1</p> <p>86:16 132:22</p> <p>133:1 143:14</p> <p>146:10,17</p> <p>147:2 154:23</p> <p>173:20 176:13</p> <p>176:15 179:7</p> <p><b>agreement</b></p> <p>30:20 60:21</p> <p>133:6 143:3</p> <p>146:21 147:1</p> <p>154:21 171:7</p> <p>173:5,24 191:8</p> <p><b>agreements</b></p> <p>34:10 123:13</p> <p>123:20,24</p> <p>125:16,22</p> <p>129:8,13 130:1</p> <p>130:9 147:8</p> <p>155:3,16</p> <p><b>ahead</b> 36:16</p> <p>81:7</p> <p><b>al</b> 6:19</p> <p><b>albright</b> 3:16</p> <p><b>alessandra</b> 4:6</p> <p>8:4 70:24</p> <p><b>alessandra.sc...</b></p> <p>4:14</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[alike - arguably]

Page 4

<b>alike</b> 55:20 <b>alive</b> 121:10 <b>allegations</b> 34:17 35:20 63:13 <b>allege</b> 63:12 <b>alleged</b> 13:11 71:20 135:9 136:22 <b>allegedly</b> 145:10 <b>alleging</b> 35:22 <b>allocated</b> 130:14 <b>allow</b> 43:19 66:4 173:12 183:2 184:21 <b>allowed</b> 61:18 119:17 120:1 124:6 180:23 189:13 <b>alter</b> 34:1 116:1 <b>alterative</b> 180:20 <b>alters</b> 115:15 <b>amicably</b> 191:3 <b>amidst</b> 148:14 <b>amount</b> 25:18 37:12 39:14 41:24 48:21 72:19,21 73:4 76:8,15,17 77:15 78:6 80:14,16,19 86:6 89:13	112:21 123:12 123:23 125:3,4 125:8,20 128:18 129:12 129:17 144:16 <b>amounted</b> 172:17 <b>amounts</b> 147:9 <b>ample</b> 184:16 <b>analysis</b> 10:17 11:6 99:3 <b>andrew</b> 1:19 179:6 180:23 193:2,18 <b>andrews</b> 35:1 36:10 132:10 149:15 <b>angel</b> 151:1 <b>ann</b> 4:22 <b>answer</b> 75:1,20 75:20,21 76:3 77:24 82:16,16 83:1 84:1,5,5 89:10 91:8 95:20 101:5 105:2 109:18 109:22 121:17 152:23 153:4 179:14 185:11 <b>answered</b> 142:7 157:18 157:24 <b>answering</b> 92:16	<b>answers</b> 40:3 42:9 78:17 98:1 111:8,10 121:23 <b>anticipated</b> 80:16 <b>anybody</b> 6:5 93:16 <b>anymore</b> 55:13 <b>apart</b> 28:19 113:21 <b>apologies</b> 99:7 <b>apologize</b> 9:13 42:3 117:11 121:3 128:14 170:7 <b>apparently</b> 105:24 164:5 <b>appeared</b> 144:3 <b>appears</b> 117:24 123:10 162:6 <b>appendix</b> 159:11 160:14 160:16 161:10 161:12 163:8 164:1,12,16 165:1 166:22 167:8,9 169:24 171:13,19,20 172:4,6,8,17,20 173:9 <b>apple</b> 31:18 32:1 50:20 61:21 126:23 140:1	<b>applicable</b> 177:13 178:2 <b>applies</b> 93:23 <b>apply</b> 94:10 110:9 152:17 <b>appreciate</b> 60:2 89:19 167:1 168:9 188:22 <b>approach</b> 160:13 <b>appropriate</b> 49:3 78:1 113:17 141:2,4 141:7 157:6 162:2 172:7 <b>appropriately</b> 39:8 66:3 174:8 <b>appropriaten...</b> 158:12 <b>approximate</b> 73:20 <b>approximately</b> 20:15 <b>april</b> 12:19 42:14 46:11 52:16 175:18 177:19 178:13 179:8,9,12,16 182:23 183:21 184:7 186:4,15 189:7,9,19,21 <b>areas</b> 33:20 <b>arguably</b> 22:13 88:20
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[argue - audio]**

Page 5

<b>argue</b> 43:6,7 174:20	50:23 52:1,6 52:17,20 74:3	127:10 128:16 130:15 132:21	<b>assume</b> 10:1,4 158:11
<b>argued</b> 23:19	74:7,10 76:15	151:13 160:1	<b>assumed</b> 188:1
<b>argues</b> 130:20	81:17 86:11	171:21	<b>assured</b> 166:15
<b>arguing</b> 9:17 9:17,19 12:11 68:7,23 131:10	88:1 89:9,15 90:14 96:12,22 101:22,23,24	<b>assertedly</b> 21:3 174:11	<b>attach</b> 170:1
<b>argument</b> 14:13 24:5 66:15 75:9 110:13 134:17 135:5 136:14 136:19 167:6 172:9,19 174:21 175:12	102:3,14 104:1 104:20 105:17 109:15,20 127:17 133:17 133:23 135:17 139:19 142:7 157:3,17,23 179:13 182:14 190:3	<b>asserting</b> 13:1 62:10 123:1 146:15 169:23	<b>attempt</b> 114:17 157:20 169:2 173:2
<b>arguments</b> 33:14 188:22	<b>asking</b> 57:16 74:21 75:21	<b>assertion</b> 17:5 75:7 98:9 118:13,16,21 123:11 135:13 138:14 139:5 159:3,4 162:22 165:6 168:14 169:20,23 170:5 171:22 172:14 180:11	<b>attempted</b> 152:4 191:15
<b>arisen</b> 171:18	78:13 83:10,24 87:8 103:8 105:1,6 111:9 111:12 116:7 140:8,9 174:1 174:7	<b>assertion's</b> 81:21	<b>attempting</b> 116:20 169:6
<b>arrangement</b> 122:10,22 123:11 126:9	<b>asks</b> 104:21	<b>assertions</b> 17:3 88:22 90:21 114:18 124:9 138:11 173:15	<b>attempts</b> 178:23
<b>arrangements</b> 126:14 152:19	<b>aspect</b> 47:24 134:18	<b>asserts</b> 172:18	<b>attorney</b> 14:13 30:1 36:8 51:20,22 70:6 82:1 83:6 88:16 89:16 90:1 94:10 105:4,8 106:10 108:17 115:8 115:16 135:14 135:21 167:12 167:15 174:20 175:11 180:2 190:1 193:14 194:10
<b>articulate</b> 70:4	<b>assert</b> 30:9 66:19 140:9 147:21	<b>assess</b> 10:24 66:6 76:23	<b>attorneys</b> 39:10 51:16,16 54:4 54:15 125:10 127:12 128:1,5 130:15 185:4
<b>articulating</b> 75:17	<b>asserted</b> 13:15 36:21,22 38:9 46:21 56:5 95:19 98:4 124:13,17,22	<b>assessment</b> 96:9	<b>audio</b> 193:8 194:3
<b>ascent</b> 18:20		<b>assignments</b> 162:14	
<b>ashley</b> 4:5 8:3 70:16		<b>associate</b> 4:23 8:1	
<b>ashley.fry</b> 4:13			
<b>aside</b> 160:16			
<b>asked</b> 13:21 14:14 27:18 40:1 47:17,18 50:14,15,18,23			

[author - beyond]

Page 6

<b>author</b> 161:17 162:3	179:14 181:17 186:14,14	148:1 150:2 162:10,11	97:21 102:6 103:5 111:15
<b>authored</b> 162:4	190:5 191:4	<b>baseless</b> 65:5	<b>believe</b> 7:15
<b>authority</b> 89:15	<b>back</b> 12:17	<b>bases</b> 85:4	16:11,19 19:9
<b>authorship</b> 161:23	13:11 14:20 15:24 24:20	86:10	20:19 26:17
<b>automatically</b> 93:1	26:15 31:9 40:19 52:22,23	<b>basic</b> 86:8 87:8	30:2 32:15
<b>availability</b> 183:18 189:19	55:21 58:16 78:23 89:7	<b>basically</b> 18:8	34:20 60:19
<b>available</b> 13:16 15:18 45:20 179:11 180:3 182:5 184:1 189:20,21 190:9	91:11 97:14 125:20 126:11 128:16 136:16 162:16 163:22 165:14 168:18 171:7 173:19 176:13	75:11 172:2	63:24 96:24
<b>avenue</b> 2:18	<b>bar</b> 31:21	<b>basis</b> 61:1 63:11 76:24 79:7 81:20 92:4 106:19 110:3 114:8 116:22 120:18 147:23,23 152:22 157:15 165:5 172:24	104:3 105:18 108:8 109:18 110:23 112:6 116:22 123:9 144:13,22 145:2 147:24 149:23 154:5 176:21,23 180:14 186:20 188:18
<b>averments</b> 44:15	<b>bars</b> 31:19 32:4	<b>bayard</b> 2:5 7:10,12	<b>belts</b> 187:20
<b>aware</b> 14:2 16:9 78:8 85:12,16 98:20 145:3 169:7,10 177:16,23	<b>base</b> 74:12 77:19 78:1,22	<b>bayardlaw.com</b> 2:8,9	<b>beneficial</b> 82:23
<b>b</b>	<b>basecamp</b> 161:20	<b>bear</b> 23:23 38:18 41:16 95:2 123:15 124:8 136:9 156:2,17	<b>benefit</b> 11:11
<b>b</b> 5:1 76:14 89:7 92:1 97:14 101:8 103:3 104:12 104:13 111:8 116:23 117:5 120:16,19 121:14,21 124:7 143:4 144:4,20,20,21	<b>based</b> 12:8 25:14 28:3 58:2 63:15 64:2 67:14 70:22 85:6 88:17 91:11,21 94:16 102:18 102:18,23,24 104:5 107:8 114:3 115:24 119:18 128:5 133:23 141:17	<b>bearing</b> 23:20 128:6	<b>best</b> 21:13 113:15 114:6 161:22 193:10 194:6
		<b>bears</b> 119:13 124:2 182:12	<b>better</b> 97:20 124:10 125:15
		<b>beginning</b> 44:1	<b>beyond</b> 12:12 19:22 20:10 34:9 70:4 75:13 138:17 138:19 151:13 157:16,22 158:1
		<b>behalf</b> 2:2 3:2 4:2 9:9 32:21 32:24 38:21 70:16 95:10	

[bias - call]

Page 7

<b>bias</b> 136:6,10 <b>big</b> 17:12 41:22 <b>bit</b> 28:18 56:2 <b>black</b> 152:21 <b>blank</b> 74:4,6 <b>blasts</b> 145:11 <b>bleeds</b> 28:17 <b>blended</b> 59:12 <b>block</b> 45:16 <b>blocked</b> 40:7 59:15 76:17 79:19 98:16 100:18 128:24 135:19,21 140:17 145:4 153:2 <b>blocking</b> 41:24 135:23 <b>blue</b> 6:8 <b>boggs</b> 1:16 <b>bolster</b> 49:22 <b>bolstered</b> 45:1 <b>bolsters</b> 39:14 <b>boundaries</b> 55:18 <b>bracket</b> 68:6 <b>brauerman</b> 2:3 6:7,8 7:9,10 <b>break</b> 24:13 42:4 95:5 122:5 <b>breakdown</b> 33:20 125:23 <b>breaking</b> 36:24	<b>brett</b> 19:10 28:14 47:16,21 76:13 86:22,24 87:1,5 101:9 101:17 102:17 159:12 160:16 160:18 161:16 162:11 163:2 170:13 <b>brief</b> 16:10 19:13 32:19 43:20 55:1 58:17 59:19 60:2 64:24 66:4,16 67:2 67:12,14 110:15 112:18 120:22 169:13 169:15 170:1 171:10 172:14 172:16 174:22 175:11 <b>briefed</b> 10:13 <b>briefing</b> 11:10 11:15 12:2,18 13:3,24 24:7 25:1 33:9 42:13 43:13 57:6 115:18 123:15 164:9 <b>briefly</b> 16:3 58:19 100:10 107:12 139:9 147:13 152:11 154:2 158:5	160:23 189:2 <b>bring</b> 41:3 68:3 99:15 121:3 <b>britton</b> 4:23 8:1 <b>broader</b> 48:8 54:9,12 <b>broadly</b> 12:11 <b>brought</b> 163:22 184:6 <b>bucket</b> 11:16 11:17,19,22 12:10,14 14:18 22:16 36:22 38:14,20 39:1 42:22 54:22,23 72:7,10 81:8 81:11,12 106:21 108:3 112:8,9 122:7 <b>buckets</b> 10:20 10:24 11:15 12:16 13:5 34:3,6 36:14 41:16 42:17 46:19 55:15 71:16 72:3,13 <b>building</b> 1:16 <b>bunch</b> 13:4 67:10 150:8 180:4 <b>burden</b> 35:9 110:9 111:1 124:5 168:4	<b>burdensome</b> 132:9 133:10 <b>burke</b> 1:15 <b>business</b> 12:12 19:23 23:1 31:11 47:24 48:9 49:24 55:20 71:1,12 81:23 82:8 94:3 122:3,11 131:6 134:10 134:15 148:13 150:15 151:1,3 153:9 156:12 156:12 <b>businesspeople</b> 92:20
			<b>c</b>
			<b>c</b> 2:1 3:1 4:1 6:1 <b>ca</b> 3:17 <b>calculate</b> 77:20 <b>calculated</b> 102:22 <b>calculating</b> 74:13 99:8 <b>calculation</b> 72:6 74:18 77:18 97:22 99:1 113:24 124:2 <b>calculations</b> 73:10 <b>calendars</b> 8:10 <b>call</b> 10:1 11:4 15:21 28:11

[call - challenged]

Page 8

75:6 97:14	30:10 32:13	157:9 161:19	<b>cautioned</b>
112:12 113:19	34:18,20,23	166:13 175:23	186:24
114:15 115:10	35:20 36:3,6	176:1,24	<b>caveat</b> 25:8,20
136:13 170:24	36:11 37:8,24	177:13 181:10	<b>caveats</b> 25:9
174:15,23	38:2,18 39:11	181:22 183:13	26:3
<b>callback</b> 71:11	41:12 46:3	184:10,12,15	<b>central</b> 150:11
<b>called</b> 40:19	48:13 49:6	185:7,7 186:11	<b>century</b> 20:22
48:5,6 113:9	51:16,18 53:12	187:5,8 189:17	<b>certain</b> 13:5
115:14 117:9	53:16,17 54:8	190:2,15	68:16,19 80:1
132:1 141:9	54:10,13 55:15	<b>cases</b> 18:18	83:16 104:6
161:20	57:12 59:9,10	31:18,24 32:2	154:21 155:1
<b>calling</b> 35:16	61:8 62:8	32:4 36:6	157:4 158:9
134:6,7	66:15 68:17,21	51:19 53:19	167:24 171:19
<b>calls</b> 24:3 29:3	72:5,23 73:12	54:2 55:3,12	189:13
35:12 53:22	73:24 76:8	62:2 65:3	<b>certainly</b> 13:16
<b>camera</b> 69:15	79:7 82:22	123:3,19	15:20 16:13
70:3 71:2,4	87:11 89:21	124:12,16,21	19:7 23:7
150:5 159:14	93:5 95:23	144:15 148:3	29:24 35:12
159:19 160:17	97:3,4 110:7	<b>categorically</b>	39:4,18 45:7,8
164:8,19 167:2	111:2 114:13	60:3	107:22 146:19
171:9	115:21 121:8	<b>categories</b> 12:7	149:22
<b>camera's</b> 6:4	121:16 124:3	33:12 69:1,1	<b>certificate</b>
<b>cap</b> 15:21,22	124:17 125:5	121:21 122:8	193:1 194:1
102:20 104:6	127:2 130:12	134:10 154:21	<b>certify</b> 193:4
<b>capably</b> 23:19	132:10 133:7	<b>category</b> 13:14	194:2
<b>capture</b> 12:7	134:20 135:2	23:3 34:8,13	<b>cetera</b> 10:16
<b>captured</b> 34:5	135:22 136:7	34:15 55:24	11:22 24:11
60:16	141:2,24 142:4	59:6 71:24	27:9 29:10
<b>care</b> 192:3	142:21 143:8	112:16 121:24	71:12 78:22
<b>careful</b> 29:7,24	144:5 146:13	122:9,10,13,18	148:13 150:8
<b>case</b> 6:18 9:5	149:21 150:1	122:22 131:3,4	168:16
9:10 10:19	152:15 154:8	158:8,8 163:15	<b>challenge</b> 44:18
12:20 22:18	154:22 155:1	<b>cause</b> 185:14	<b>challenged</b>
25:12,19 28:7	155:23 156:4	186:18	166:22 167:10
28:16 29:15	156:10,19,23		

## [challenges - comments]

Page 9

<b>challenges</b> 29:10	<b>citation</b> 149:14	<b>clear</b> 31:8	<b>cohen</b> 4:4 8:3,7
<b>chance</b> 32:19	<b>citations</b> 39:24	37:17 41:15,17	165:18,19
59:19 67:14	45:21	57:8 93:5	167:5,9 168:8
114:6 116:23	<b>cite</b> 93:21	95:20 100:21	168:19 169:1
159:1 165:20	<b>cited</b> 34:23	102:15 103:8	175:7,8 182:1
174:21 175:12	80:7 84:3	106:13 108:13	182:9 185:22
<b>chances</b> 166:15	90:23 139:22	129:16 170:18	187:14 188:8
<b>change</b> 162:7	<b>cites</b> 86:22,23	175:23 176:16	<b>colleague</b> 7:11
<b>changed</b> 137:6	121:1,4 123:4	181:20 182:11	30:11 31:5,12
162:6	149:20	183:18 186:3	70:24 96:17
<b>changes</b> 29:9	<b>civil</b> 1:7 6:19	188:9	181:7
60:4 61:11	6:23 148:5	<b>clearly</b> 57:11	<b>colleagues</b>
169:1	<b>cjb</b> 7:2	85:24 100:13	40:13
<b>changing</b> 166:1	<b>claim</b> 40:20	100:20 127:10	<b>collected</b> 25:15
167:21	48:3 119:2	127:19 128:11	25:19 161:19
<b>characterize</b>	167:14	148:23	<b>collection</b> 26:5
151:2	<b>claimed</b> 39:7,8	<b>clerk</b> 4:22	<b>color</b> 6:7
<b>characterized</b>	<b>claiming</b> 40:17	<b>client</b> 20:2 30:1	151:12
133:5 149:12	42:23 49:11	70:6 82:1 83:6	<b>come</b> 81:17
<b>charrington</b>	118:1 122:24	88:16,19 89:16	84:8 86:1
3:14 8:6	131:10 140:12	90:1 94:10	117:13 148:23
<b>choice</b> 185:3	<b>claims</b> 132:11	105:4,8 106:10	165:13 173:5
<b>choosing</b> 94:5	134:19 139:15	108:17 115:6,8	175:20 191:7
<b>chose</b> 16:7 65:3	<b>clarification</b>	115:16 135:14	<b>comes</b> 25:2
<b>chris</b> 41:22	12:9,14 117:12	167:12,15	56:6 65:15
<b>christine</b> 57:1	159:11 179:13	<b>clients</b> 115:23	66:6 74:16
<b>christopher</b>	<b>clarify</b> 27:13	<b>close</b> 65:15	81:19 90:5
1:15	61:19 62:3	177:11 182:10	161:15
<b>circuit</b> 10:13,15	108:21 131:20	183:1 186:5,15	<b>coming</b> 87:15
93:22	132:12 133:3	187:11	167:16 187:22
<b>circumstances</b>	146:1 160:21	<b>closed</b> 76:10	<b>commanded</b>
149:17,24	<b>clawback</b> 80:24	97:15	41:9
153:21 156:5,9	81:4,7,13	<b>cloud</b> 64:10	<b>comments</b>
	117:23	<b>clue</b> 143:3	26:14

[commercial - conclude]

Page 10

<b>commercial</b> 23:24 24:12 48:14 49:12 50:5,7,11 62:9 62:10,14 135:9 136:12,15,18 137:3,9,11,16 137:19 138:19 139:7,15 140:5 140:13 143:12 <b>commercially</b> 48:4 50:18 <b>commit</b> 99:22 164:18 <b>common</b> 30:14 30:17,20 147:4 147:7 <b>commonwealth</b> 193:20 <b>communicate</b> 104:24 105:3 <b>communicated</b> 52:13 57:19 97:7 103:22 105:12,22 106:3,14 107:20,21 108:12 111:16 117:1 135:19 144:8 <b>communicating</b> 38:3,9 39:5,9 62:22 140:3 <b>communication</b> 27:8 82:5,8	88:16,19 89:12 93:6,10 102:8 109:24 111:4 134:18 160:1,2 160:8 <b>communicati...</b> 11:21 24:2,10 24:18 25:3,11 26:6,12,17 27:2,4,21 28:9 29:14 33:22 34:11,13 37:18 46:3,9 49:17 56:1,6,9,12,14 56:18 57:9 58:12 60:17 61:7 82:2 83:7 84:6 93:21,23 97:9 98:21 105:4 106:11 107:24 111:10 115:16 117:3 131:12,13,21 131:22 132:14 132:15 133:20 134:6,7,11,15 135:7 136:3,4 140:22 141:18 141:22 142:12 142:15 145:7 145:10 146:16 146:20 148:21 150:19 151:6,7 151:17,21 152:18 153:20	155:11,19,24 157:5,7,9 159:22,24 163:15 172:21 <b>companies</b> 83:12,16 <b>company</b> 1:9 16:2 17:9,13 17:18 18:3,6 18:16 19:3,8 20:8,20 48:22 50:1,2 51:4 72:12 86:8,14 88:21 89:11,14 89:17 92:20 94:5 97:22 98:6 102:6,24 103:5 111:16 112:1 132:2 136:23 140:10 <b>company's</b> 18:20 75:2 120:17 137:4 139:21 <b>comparable</b> 99:7 127:6 <b>compared</b> 59:4 <b>compel</b> 70:21 <b>complaining</b> 100:14 <b>complaint</b> 97:10,11 <b>complaints</b> 168:21	<b>complete</b> 15:20 15:23 16:4 182:22 186:11 189:8 <b>completed</b> 42:13,18 177:19,21 <b>completely</b> 146:8 <b>comply</b> 178:10 <b>component</b> 130:10 <b>components</b> 130:13 <b>comprehensive</b> 26:5 <b>compromise</b> 179:21 <b>computation</b> 73:15,20 <b>concern</b> 54:14 84:11 89:21 100:2 149:8 <b>concerned</b> 96:18 97:6 <b>concerning</b> 21:23 22:11 26:12 63:7 100:18 105:20 145:5 152:18 <b>concerns</b> 35:8,9 38:8 <b>conclude</b> 59:8 110:4 141:24
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[concluded - converted]

Page 11

<b>concluded</b> 41:11,12 192:9 <b>concluding</b> 41:14 <b>conclusion</b> 62:1 107:7 142:5 <b>concur</b> 34:7,8 34:13 44:4 <b>conduct</b> 34:17 35:20 36:4,13 36:23 37:4,23 38:7,16 63:10 63:13 <b>confer</b> 59:1 164:3,10,15 165:2,13 167:18 171:6 <b>conference</b> 8:11 <b>confers</b> 58:4 165:22 166:2 <b>confidence</b> 88:20 106:3 <b>confidentiality</b> 21:21 22:12 30:20 <b>confines</b> 157:20 <b>confirm</b> 24:24 85:3 144:23 <b>confirmed</b> 13:11 103:12 108:7 162:13 <b>conflict</b> 180:18 190:2	<b>confusion</b> 161:15 <b>connection</b> 21:21 63:19 <b>conscientious</b> 39:19 <b>consent</b> 7:2 <b>consequences</b> 142:17 <b>consider</b> 35:7,9 41:5 55:6 170:20 171:2 <b>consideration</b> 149:11 <b>considered</b> 22:6,21,22 39:1 177:12 <b>consistent</b> 120:23 <b>consistently</b> 27:20 46:9 153:2 <b>constantly</b> 168:21 <b>consultant's</b> 115:20 <b>consultants</b> 92:21 <b>consulting</b> 86:14 108:7,8 108:20,22,24 109:8,19 110:2 110:6,13 111:6 115:14	<b>consummated</b> 152:19 <b>cont'd</b> 3:1 4:1 <b>contain</b> 126:8 <b>contend</b> 72:4 166:10 187:7 <b>contended</b> 166:18,19 <b>contending</b> 143:12 <b>contends</b> 112:22 <b>content</b> 107:2,8 163:2 <b>contention</b> 73:8 74:20 75:4,12 78:24 97:11 113:7,9 <b>contentions</b> 96:23 97:15,19 97:20 98:22 113:14 <b>contents</b> 26:12 84:6 121:7 <b>context</b> 48:8 69:24 83:10,14 89:20 94:9 149:19 152:24 <b>contingency</b> 126:14 <b>continuation</b> 31:22 63:7 <b>continuations</b> 32:2	<b>continue</b> 64:11 65:5 67:6 <b>continued</b> 16:14 <b>continuously</b> 19:12 <b>contours</b> 145:12 <b>contrast</b> 51:7 <b>contributed</b> 113:23 <b>conversation</b> 17:23 27:19 45:6 82:17 90:12,17 91:20 91:23 92:6 93:16 102:5 137:23,24 138:4,23 143:22 <b>conversations</b> 11:21 22:20 23:11,17,20 28:20,22 29:3 29:13,19 30:13 38:19 43:9 53:8 81:19 83:3 85:18 90:24 92:13 94:17 96:1,9 98:10 107:18 138:12 144:3 146:24 150:17 <b>converted</b> 61:23
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[convey - court]

Page 12

<b>convey</b> 91:16 171:23	<b>corresponding</b> 55:4	103:11,11 104:20 105:5	9:15 10:14 11:9 12:15
<b>conveyed</b> 76:19 82:4 88:14 90:6 111:22	<b>corroborates</b> 121:2	105:10 106:9 106:14 108:10 110:18 111:4	13:19 14:4,10 17:1 19:16 20:14 21:2
<b>conveying</b> 89:13	<b>costs</b> 181:14	117:3 123:4,19 125:19 126:1	22:5,15 24:16 24:23 26:18
<b>coordinate</b> 176:2	<b>could've</b> 40:8 87:17 104:1 110:16 115:10	128:18 141:14 143:11 152:24 157:19 160:23	27:7,11,23 28:17 30:4,7 30:16,22 31:20
<b>core</b> 128:1	<b>counsel</b> 6:10 7:5,6,8,12,19 7:21 9:16	170:13 172:21 174:21 175:10 180:22 181:1,3	32:10,13,17 33:3,6,16 35:7 35:8,19 36:17
<b>corporate</b> 26:10	11:12 12:13 14:9 16:24 17:6,7,7,15,21	182:14 183:23 193:11,14 194:7,10	36:20 38:15,24 39:21,22 40:1 42:5,8,12,16
<b>corporation</b> 1:5	18:3,7 19:10 19:11,14,20 20:10,12 21:20	<b>counsel's</b> 35:6 98:16	45:14,18,20 46:13,16 48:10 50:6,9 51:10
<b>correct</b> 13:20 53:9 54:24 71:15 73:6 74:8 77:12 78:2 80:22 84:11 91:1,22 93:20 96:16 101:7 106:23 111:18 124:23 125:17 129:21 133:4 135:3 142:18 144:12 144:23	30:23 31:13 32:8,8,11,20 34:21 39:9 40:12 44:2,3 45:7 47:16 51:11 53:18 55:4 58:3,9 59:10,11 60:23 66:1,7,11,12 68:7,23 75:22 76:19 81:19 82:9,17,18 83:2,3 85:19 85:22 87:24 88:13 92:21 93:1,10 100:8 101:11,12,17	<b>counseling</b> 47:9 <b>counterparties</b> 128:4 <b>couple</b> 17:19 19:2 20:23 46:18,18 91:17 108:5 136:15 152:11 171:14 171:17 172:5 <b>course</b> 28:3 29:22 30:15,19 65:18 74:24 98:2,18 177:8 177:9 183:8	53:1,3,10 54:1 54:17,20 55:23 58:14 59:17 62:13,19 64:12 64:16 65:23 66:8 68:2 70:18 71:5,17 72:24 73:3,7 74:2,15 77:4 77:22 78:13 79:21 80:9,21 80:23 81:6,10 82:11 83:19 84:18 85:8 87:10 90:7 91:7,10 93:11

[court - damages]

Page 13

94:12 95:4,15	152:17 153:2	<b>created</b> 161:22	<b>d</b>
96:6 97:17	153:24 154:3	163:5 167:11	<b>d</b> 6:1 109:18
99:12 100:22	154:14,16	169:21 170:2	<b>dahl</b> 108:8,20
100:24 101:18	159:20 160:22	172:10,10	108:21,24
103:3,7 104:11	161:4 162:17	<b>creates</b> 55:14	109:8,18
104:14 105:9	163:6,13 166:4	<b>credibility</b> 51:4	110:13 111:5
105:23 106:20	166:8 167:1,5	136:10	115:14
107:3,4,11	167:20 168:7	<b>credibly</b> 43:17	<b>damage</b> 72:6
108:1,23 110:3	168:12 169:12	<b>critical</b> 60:10	78:18
110:14 111:5	170:15 175:4,9	187:8	<b>damages</b> 23:23
112:2,9 117:19	176:9,20 177:4	<b>cross</b> 65:22	24:11 48:14
118:7,12,20	177:15 178:4	<b>crucial</b> 65:16	49:5 50:1 55:6
120:5,7 121:11	178:15 179:23	188:1	71:10,21 72:4
122:20 123:15	180:16 181:5	<b>cruciality</b>	72:18,19 73:4
124:10,20,24	181:23 182:24	65:13	73:9,14,19
125:3,8,24	184:20 185:16	<b>culling</b> 172:4	74:6,13,18
126:5,18,21	187:9 188:4,13	<b>cumulative</b>	76:8,17,23
127:1,8,16,22	188:20 191:24	13:7 127:18	77:8,15,18,20
128:9,15	<b>court's</b> 39:19	128:10 129:1	78:5 79:18,24
129:15 130:3	112:14 157:20	130:2,21	80:14,19 86:22
132:17,20	158:2,16	<b>cumulativeness</b>	94:23 95:2,3
133:10 134:2	178:13	66:18	95:19,24 96:2
134:16 136:11	<b>courtroom</b> 4:20	<b>curious</b> 41:20	96:9,11,23
137:19 138:17	<b>courts</b> 149:22	<b>current</b> 96:9	97:12 98:7,22
139:10 140:20	156:5	172:3	99:1 100:19
141:13 142:24	<b>cover</b> 64:20	<b>currently</b> 20:18	107:16,23
143:6,17	65:2,3 183:23	<b>custodians</b>	112:10,18,21
144:18 145:16	<b>coverage</b> 187:3	186:2 187:10	113:4,5,15,24
145:20 146:14	<b>covered</b> 36:5	187:11,15	114:10 118:15
146:22 147:14	40:21 153:20	<b>cut</b> 14:4 26:18	118:24 120:11
147:17 148:7	<b>covering</b> 71:13	154:16 171:14	121:7,16
148:10 149:1	<b>covers</b> 112:6	<b>cutoff</b> 25:21	123:16 124:8
149:12,15	<b>create</b> 54:13	26:2 146:10	125:5 126:14
150:6 151:14	132:3 146:11	<b>cv</b> 1:8	127:4,6,21
152:1,9,13,15			129:13 130:10

**[damages - deny]**

Page 14

135:3,5,9	<b>days</b> 20:18,22	<b>declaration</b>	127:2 157:24
136:11 137:10	32:16,16	70:7 159:2	164:3 171:2,10
137:17 138:13	165:15 179:7	162:2 165:7	174:14 175:6
145:11 151:12	186:23 190:6	173:13	189:5 190:14
156:3,21,24	<b>dc</b> 4:10	<b>declined</b>	<b>defendants</b>
181:10,14,22	<b>de</b> 1:18 2:7 3:8	178:10 179:14	13:4 32:21
187:8	<b>deadline</b> 177:6	<b>deemed</b> 49:2	<b>defense</b> 37:6,21
<b>damon</b> 28:13	178:13 182:23	<b>defective</b>	38:1,2 52:13
<b>dark</b> 78:17	189:7,11	182:19	63:20 140:10
<b>dash</b> 7:2	<b>deadlines</b> 186:6	<b>defendant</b> 1:10	<b>defenses</b> 36:4
<b>data</b> 57:18	186:11	3:2 4:2 10:22	51:8 134:20
<b>database</b>	<b>deal</b> 67:5,22	16:6 24:4 33:1	<b>degree</b> 116:8
131:24	69:18 70:10	43:5 51:18	<b>delaware</b> 1:2,4
<b>datapoints</b>	100:2	69:14 70:16,21	1:8 7:7,20
140:5	<b>deal's</b> 152:19	72:4,8 78:16	152:16
<b>date</b> 1:13 74:5	<b>dealing</b> 21:8	81:2,13 95:19	<b>delay</b> 63:16
86:19 155:1	<b>dealt</b> 189:13	112:20 114:13	<b>deliberations</b>
162:6 163:3,3	<b>decide</b> 48:20	114:16 115:12	23:5
163:4,12	128:4 172:23	116:6,19,22	<b>demand</b> 53:21
165:15 168:14	<b>decided</b> 75:3	117:10 121:15	83:11,15 84:15
168:20 170:6	83:13	122:23 130:6,8	85:5 99:13,14
171:21 173:11	<b>decision</b> 17:24	131:9 133:1	99:17 114:18
180:1,5,8,8,12	30:11 35:5	138:4 142:22	120:24
180:14 182:4,6	43:17 47:24	156:1 157:1	<b>demonstrate</b>
183:15,16	67:19 81:24	171:13 172:9	45:5 69:22
188:10 189:20	82:7,8 83:15	172:13,16	106:4 115:7,18
190:6,10,12,12	112:11 143:1	173:9 175:16	160:7
190:18	148:2 158:4,11	189:18 190:19	<b>demonstrated</b>
<b>dates</b> 28:5	158:16 159:5	<b>defendant's</b>	156:1
67:18 88:7	163:18,21	7:20 8:20 9:7	<b>denied</b> 35:5
166:19 180:4	179:5,19	11:11 25:1	181:21
180:15,20	<b>decisions</b> 17:14	32:20 66:17,19	<b>deny</b> 107:7
<b>day</b> 15:24	18:2 19:5	68:3,9,13 69:2	112:24 114:14
73:17 77:13	114:3,4 119:16	70:14 97:24	114:24 116:3
189:22 192:2	157:19	112:17 116:13	157:11 158:14

[deny - disagree]

Page 15

163:16 <b>denying</b> 35:1 <b>departed</b> 162:15 <b>departure</b> 162:14 <b>depo</b> 12:23 75:10 83:22 84:2 91:17 111:8,15 120:11 144:20 180:1 182:2 189:14,16 190:8,21,23 191:5 <b>depos</b> 120:16 144:20 176:6 180:4,11 188:5 189:4,9 <b>depose</b> 54:11 92:14 98:6 107:23 181:9 <b>deposed</b> 14:8 32:11,15 39:11 97:2,3 <b>deposing</b> 54:2 <b>deposition</b> 35:11,17 37:16 42:1,1 45:8,19 47:18,18 49:13 52:7,20 55:16 57:1,7 59:10 70:22,23 72:19 74:17,20 76:4 80:2,10,18	82:9 85:11 87:19 90:9 91:4,14,16 93:8 97:1 99:11 100:4 101:9 103:4 105:6 107:21 109:1 111:7 113:3,9 116:24 117:5,18 121:22 124:7 128:24 139:12 139:20 142:8 144:3,21 146:6 155:18 157:14 174:19 175:19 178:9,10,16 179:22 180:24 181:4 182:7 183:12,13,17 183:19,20,24 184:17,20 185:4,5,6,18,18 189:1,4 190:1 190:4 191:3 <b>depositions</b> 12:21 13:17 14:3,7 36:5 41:13 51:20 54:4,14 57:4 59:5 64:5,19 76:7,10 77:1 77:13 79:6,16 97:5 133:18 134:1 148:14	175:19,24 176:16,24 177:1,3,10,17 178:2,19 179:1 179:5,10 182:23 183:3 184:23 185:17 186:14,22 191:10 <b>deputy</b> 4:20 <b>derived</b> 96:8 139:24 <b>describe</b> 138:21 <b>described</b> 21:24 38:17 138:20 157:8 <b>description</b> 5:2 21:13 <b>descriptions</b> 166:6,17 167:21 <b>design</b> 21:17,18 22:3 <b>designated</b> 144:24 181:18 <b>designee</b> 181:17 <b>designer</b> 21:11 21:22 <b>designers</b> 21:5 <b>desire</b> 119:6,10 <b>desk</b> 190:23 <b>despite</b> 142:9 178:23	<b>detail</b> 31:1 40:21 <b>details</b> 61:22 <b>determined</b> 105:21 <b>developing</b> 136:22 150:24 <b>development</b> 141:9 150:24 152:6 <b>dial</b> 9:24 <b>different</b> 10:12 49:10 54:5 68:10 69:1 79:22 105:11 165:23 167:21 <b>differently</b> 83:4 <b>difficult</b> 45:3 189:8 <b>digital</b> 193:8 194:3 <b>diligence</b> 27:15 185:14 186:16 <b>direct</b> 89:7 109:23 152:15 <b>direction</b> 162:11,13 <b>directly</b> 87:2 92:16 119:7 123:16 170:6 <b>disagree</b> 11:5 43:21 70:11 97:12 106:9 133:4 160:12
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[disagreed - divestment]

Page 16

<b>disagreed</b> 25:13 133:7	44:14 45:12,16 46:4,6,8 51:9	<b>discreet</b> 20:12 69:9	<b>dispute</b> 8:22 25:1 26:21
<b>disagreements</b> 157:21	53:4 56:7 58:5 58:12 60:12	<b>discretion</b> 177:9	30:24 31:14 36:2 46:8 56:3
<b>disclose</b> 30:1 83:2,6 84:5	61:5,10,12 63:1,9 64:18	<b>discuss</b> 39:21 117:7 163:11	58:18 60:9 68:11 95:11
<b>disclosed</b> 130:22 187:15	66:11,19,22 67:15 68:3	166:9 191:2 <b>discussed</b> 29:21	113:3,13 121:10 123:7
<b>discloses</b> 126:10	69:1,2 73:16 73:17,24 74:14	30:2,4 115:1 122:6 144:8	153:1 157:3 158:15 159:7
<b>disclosing</b> 90:1	77:14 78:4,11 87:7 95:1	170:8 174:13 191:9	161:11,12 163:21 167:1,3
<b>disclosure</b> 101:14 106:19	97:15 98:2 103:2 124:1	<b>discusses</b> 107:2 <b>discussing</b>	170:21 174:8,9 175:14,24
<b>disclosures</b> 73:13,14 74:11	132:7,8,24 133:8,9,15	83:14 <b>discussion</b>	176:12 178:14 183:5 184:8
76:23 97:12 181:12 183:9	140:16 142:10 142:18,20,21	60:24 103:9 134:24 141:22	<b>disputes</b> 6:22 8:21 9:7 12:22
185:24 <b>discoverable</b>	142:22 143:1 143:15 146:11	144:14 147:9 <b>discussions</b>	23:10 40:14 58:5 68:3,15
52:14 148:17 154:13	146:18 149:12 153:3,19	23:4 37:2 51:13,18 80:3	69:11 146:12 158:20 164:20
<b>discovery</b> 6:22 8:20 9:7 13:2	154:21 155:4,7 155:17 156:6	83:1 86:11 146:5,23 147:3	171:2 191:15 191:19
13:10,18,21 15:8,14,17,20	158:12 170:21 172:24 174:8	149:17,19 150:10,12	<b>disputing</b> 69:17 <b>distance</b> 124:1
15:21 16:6,7 16:17,19 18:12	175:17 176:4,7 176:12,18,21	151:9 155:21 156:17 178:23	<b>distinct</b> 38:13 <b>distraction</b>
23:10 25:1,12 28:7 30:24	177:11 178:1 178:13,15,18	<b>disfavored</b> 113:10	64:11 <b>district</b> 1:1,2
33:17 37:13,15 37:16 40:8,9	179:2,18 180:5 183:1,8,19	<b>dishonest</b> 35:21 <b>dismiss</b> 35:7,9	41:4 75:18 152:16
41:1,6,12,14,14 41:19,22 42:18	186:5,6,15 189:7,11	<b>dismissed</b> 132:10 133:11	<b>divested</b> 61:20 <b>divestment</b>
42:19,23,24 43:7,10 44:8			61:23

[doc - eleventh]

Page 17

<b>doc</b> 120:10,14 159:4 161:6 164:11 169:21 <b>docket</b> 67:13 148:6 <b>docs</b> 68:18 69:8 69:15,16,22 70:2 131:17 161:10,12 162:19 164:7 164:20 165:4,7 165:11 167:8 169:19 170:24 171:12,16 172:2,3 173:1 173:8 174:6 <b>document</b> 21:12,14 35:12 56:8 57:14 70:5 71:11 80:24 81:4,4 117:23 118:9 118:14,17,23 119:4,19 120:1 120:19,21,22 121:1,4,15 133:19 142:9 161:22 166:16 166:16 169:24 172:10 187:24 <b>documentation</b> 44:23 <b>documented</b> 58:12 182:12	<b>documents</b> 10:21 16:15 21:4,23 25:22 25:24 26:5,24 27:2 35:16,17 44:17 45:21 58:21,21,23 59:5 68:20 69:23 71:2,4 104:5 105:20 117:14,15 118:22 120:15 129:3 131:14 139:16 140:18 142:16 145:9 149:9 150:3 151:10 157:4 158:24 159:12 159:21 160:15 160:17,17 161:16 162:1,3 162:8,9,9 164:6,16 166:14,20,21 167:10,11,15 168:1,5 169:3 169:9 170:9 171:9,20 172:20 173:12 173:16 174:10 174:11 183:10 187:16,18,19 187:24 188:2,3 <b>doing</b> 140:6	<b>dollars</b> 29:16 <b>door</b> 100:6 114:18 <b>double</b> 154:6 <b>doubt</b> 153:18 <b>doubtlessly</b> 181:16,17 <b>dozen</b> 20:23 <b>draft</b> 142:12 145:6 <b>drawing</b> 134:13 <b>drawn</b> 92:12 <b>dropped</b> 188:18 <b>dual</b> 188:11 <b>due</b> 27:15 162:22 <b>duly</b> 178:8 193:5 <b>dykstra</b> 41:22	188:6 <b>earn</b> 72:21 76:16 80:17 137:1 <b>earned</b> 123:24 125:18 129:12 129:24 150:22 153:14 <b>earns</b> 153:12 <b>easily</b> 165:1 <b>ed</b> 28:14 <b>edit</b> 161:21 <b>edited</b> 163:4 170:12 <b>edits</b> 162:5 <b>effect</b> 31:19 101:6 144:14 <b>effort</b> 54:11 <b>efforts</b> 45:16 52:2 55:5 58:22 148:16 <b>eight</b> 137:10,17 <b>eighth</b> 10:15 <b>either</b> 13:16 14:18 15:17 25:15 29:15 33:15 51:18 74:12 77:16 79:14 83:12 87:7 135:19 183:12 <b>elected</b> 185:3 <b>elements</b> 141:8 <b>eleventh</b> 4:9 167:17
		<b>e</b> <b>e</b> 2:1,1 3:1,1 4:1 4:1 5:1 6:1,1 <b>earlier</b> 16:13 36:6,10 38:10 39:13 41:18 56:22 58:8 60:10 94:8 110:12 115:11 131:23 132:5 132:10 133:7 <b>early</b> 12:19 20:17,21 62:16 136:16,23	

## [elicited - examples]

Page 18

<b>elicited</b> 142:15 <b>elliott</b> 4:3 8:3,6 32:23,24 33:4 33:5 34:4 36:19 37:5 38:23 39:2 42:7,11,15 43:22 47:7 48:24 50:8,14 51:24 53:2,9 53:24 54:6,17 54:19,24 56:20 58:14,19 59:18 59:21 60:4 62:5 65:14 68:1 84:12 89:9 131:23 139:8,11 140:20 141:6 147:12,15,16 152:10,13,14 154:15 157:14 <b>elm</b> 148:4 <b>else's</b> 80:11 <b>email</b> 25:11,15 25:18,18 61:4 61:6 132:3,6,8 132:23,24 133:2,8,9,15 142:18,20 143:1 145:11 179:15 <b>emails</b> 60:12 131:24 132:1 133:6,12,16,17	133:21 <b>embarrassing</b> 169:5 <b>employed</b> 193:11,14 194:8,11 <b>employee</b> 18:5 27:3,6,9 57:2 193:13 194:10 <b>employees</b> 17:9 20:16,18,24 28:24 43:1 56:13 97:8 162:14 <b>encompassed</b> 159:18 <b>ended</b> 13:3,24 14:24 46:24 77:13 <b>ends</b> 7:2 <b>endured</b> 32:4 <b>enforcement</b> 19:21 22:1 48:1 94:6 <b>engage</b> 110:4 <b>engaged</b> 150:23 <b>engaging</b> 27:3 <b>enmeshed</b> 18:19 <b>ensure</b> 22:12 166:16 178:1 178:24 <b>entered</b> 60:21 154:5	<b>entire</b> 8:13 20:4 137:4 <b>entirety</b> 138:24 <b>entities</b> 44:3 127:11 <b>entitled</b> 76:20 77:11 98:1 123:21 <b>entity</b> 16:1,3 41:23 94:7 110:19 115:14 138:8 <b>equal</b> 77:8 <b>equity</b> 61:24 <b>equivalent</b> 33:15 <b>es</b> 193:4 <b>esi</b> 161:18 183:9 186:1 187:10,11,15 187:17 <b>esquire</b> 2:3,4 2:12,13,14,15 3:3,4,14 4:3,4,5 4:6 <b>essential</b> 151:12 <b>essentially</b> 14:12 17:19,22 18:3,6 19:3 26:4 53:5 74:23 88:13 127:16 176:9 <b>establish</b> 168:3	<b>established</b> 85:21 115:3,7 <b>et</b> 6:19 10:16 11:21 24:10 27:9 29:10 71:12 78:22 148:13 150:8 168:16 <b>ethe</b> 84:6 <b>evd</b> 5:2 <b>event</b> 134:2 <b>everchanging</b> 166:6 <b>everybody</b> 55:21 192:2 <b>evidence</b> 88:24 <b>evidenced</b> 37:10 <b>evident</b> 173:15 176:3 <b>evolving</b> 168:21 <b>exactly</b> 67:11 121:5 139:20 <b>example</b> 15:13 39:4 42:21 52:6 60:16 74:2 77:19 79:8,17 86:5 86:20 94:6 104:19 126:10 129:7 154:22 156:7 <b>examples</b> 142:15 145:9
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[exception - fact]

Page 19

<b>exception</b> 47:22	<b>expediency</b> 25:14	<b>explain</b> 189:2	141:7 151:6
<b>excerpts</b> 64:5	<b>expert</b> 46:6	<b>explained</b> 98:24 99:3	154:20 155:9
<b>exchange</b> 104:19	78:4,5,6,9,20	<b>explains</b> 62:5	155:20 157:2
<b>exclusive</b> 160:15	78:21 79:3,3	<b>exploration</b> 39:7 51:8	165:4
<b>exclusively</b> 179:11	79:10,18,23	<b>explore</b> 87:6	<b>extra</b> 88:23
<b>excuse</b> 35:3	80:3,4,7 86:21	97:8 124:7	107:6 169:16
<b>excused</b> 8:14	87:4,13 89:3,4	140:16	<b>f</b>
<b>executive</b> 49:18	89:19,22 90:6	<b>extemporane...</b> 170:17	<b>f.3d</b> 93:22
49:19 57:21	90:20,21 91:2	<b>extend</b> 177:5	<b>face</b> 29:9 119:1
<b>executives</b> 76:13 79:4	92:9,17 94:14	186:18 189:10	173:15
125:21 135:17	94:14,20,23	<b>extended</b> 177:24 178:15	<b>facebook</b> 152:15
<b>exhibit</b> 87:21	95:3,21,22,23	178:17	<b>faced</b> 41:23
89:7 101:8	95:24 96:8,13	<b>extension</b> 176:4	<b>facially</b> 60:6
104:12,13,18	97:5,7 98:2,7	176:21 177:20	115:24
109:13 118:8	98:12,20 99:2	178:13 184:22	<b>fact</b> 15:7 31:17
118:10 126:10	99:3 106:24	186:8,9,21	31:21 40:4,11
126:22 129:6	107:21,23	<b>extensive</b> 168:18	41:11,14 42:18
<b>exhibits</b> 126:8	109:16,24	<b>extensively</b> 170:8	45:9 49:9
126:15 142:14	113:21 119:21	<b>extent</b> 11:1,2,3	57:13 73:17,23
169:1 172:16	121:3,4 124:1	13:20 26:9,16	74:14 77:14
<b>existence</b> 86:5	126:15 127:7	29:18 62:6	85:21 86:8
123:11 136:23	184:13,13	66:10 70:3	87:6 89:13
137:5	<b>expert's</b> 79:7	75:13 80:14	93:3,19 95:1
<b>exited</b> 31:11	96:2 107:16	82:6 90:13	97:15 100:7,14
<b>expect</b> 18:17	113:24 119:15	97:6 98:13,14	106:6 115:12
<b>expected</b> 76:16	120:2	112:11 114:16	140:3,10
184:22 185:2	<b>expertise</b> 21:17	117:1,4 130:19	158:10 162:7
187:1	<b>experts</b> 55:6	131:11 138:11	166:17 176:7
<b>expects</b> 35:16	118:24 184:11	140:13,24	177:11 178:8
72:21	<b>expiration</b> 143:15		178:15 179:2
	<b>expire</b> 25:23		180:4 181:9
	<b>expired</b> 25:23		183:1,19 186:5
	143:14 184:5		186:6,15

[factor - focused]

Page 20

<b>factor</b> 65:12 119:8 136:13 137:10,17 <b>factors</b> 10:13 10:15 33:15 43:14 47:3 66:6 67:15 72:5 96:12 112:22 119:9 <b>facts</b> 46:2,2,3 59:14,16 60:10 63:6 71:19 79:18 81:23 82:3,4 83:5 86:4 103:12 106:13 123:23 <b>factual</b> 27:16 35:24 52:10 80:6 87:8 89:14 93:3 100:17,18 101:5 110:10 176:18 <b>failure</b> 140:18 176:2 <b>fair</b> 14:1 34:11 37:5,12 38:24 39:14 121:11 128:15 141:11 142:4 148:22 151:14 156:7 156:14,24 189:16 <b>fairly</b> 12:7 116:20 155:21	175:23 176:3 178:7 182:7 <b>fairness</b> 101:16 106:16 109:6,7 110:17 115:4 <b>faith</b> 157:15,19 <b>falls</b> 12:13 160:19 <b>false</b> 81:21 <b>familiar</b> 102:6 103:9 <b>far</b> 16:12 27:14 44:9 118:18 127:2 129:19 138:21 <b>farnan</b> 3:3,9 7:22,23 <b>featured</b> 16:15 <b>february</b> 13:12 183:7 186:8 <b>federal</b> 1:16 51:16 <b>fee</b> 49:3 122:9 122:22 123:11 126:9,14 128:12 129:17 <b>feel</b> 185:12 <b>fees</b> 125:10,14 126:13 127:12 128:1 130:15 <b>fifth</b> 34:16,24 36:12 <b>fight</b> 146:12 <b>figure</b> 10:19 75:1 138:18	139:1 164:15 165:3 173:24 174:1 <b>file</b> 158:22 174:7 <b>filed</b> 31:18 51:19 114:13 <b>filing</b> 72:9 187:5 <b>final</b> 77:13 171:10 <b>finances</b> 76:14 <b>financial</b> 136:6 183:7 <b>financially</b> 193:15 194:11 <b>find</b> 39:22 41:11 46:5 87:19 151:1 <b>fine</b> 70:2,19 110:8 <b>finger</b> 3:5 4:24 7:23 <b>finish</b> 174:22 <b>firm</b> 17:11,16 18:6 20:5 31:13 32:3 41:8 53:19 59:12 61:16 108:8 110:2,6 <b>firm's</b> 53:12 <b>first</b> 6:18 7:6 9:5,8 13:1 24:18 28:5 29:17 41:2	43:24 54:7 68:9,12,24 69:11 71:9,10 71:13,18,18,22 72:15,17 80:12 81:10,11 87:11 101:4 105:13 108:3 112:7,7 112:9,17,20 120:24 130:5 139:17 145:20 152:14 154:19 164:1,4 166:3 166:4 168:15 171:5 179:2 183:11,14 186:7 <b>five</b> 19:4 34:5 36:14 41:16 55:15 165:23 166:15 167:19 176:21 178:15 <b>flavor</b> 24:6 <b>flipside</b> 43:5 <b>floodgates</b> 54:14 <b>floor</b> 2:18 <b>flourish</b> 151:1 <b>flush</b> 135:4 <b>focus</b> 11:14 33:10,12 87:16 134:23 <b>focused</b> 8:22 9:1 31:3 42:6,9 122:21 147:18
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[focused - funding]**

Page 21

156:13 <b>focusing</b> 131:15 <b>foley</b> 20:5 88:10,14 90:18 103:12 105:24 108:21 109:5 115:4,14 122:10,23 123:12 <b>folks</b> 22:21,22 64:19,20 96:1 <b>follow</b> 86:11 108:18 113:2 <b>followed</b> 57:15 85:20 <b>following</b> 35:10 57:7 83:20 84:12 123:13 154:19 171:4 <b>follows</b> 155:8 <b>footing</b> 90:4 <b>footnote</b> 94:16 <b>footnotes</b> 98:8 107:18 <b>force</b> 22:8 <b>foregoing</b> 85:2 193:3,4 194:4 <b>forget</b> 87:18 <b>form</b> 27:20 131:24 133:21 <b>formatting</b> 169:4 <b>formed</b> 79:6	<b>former</b> 18:10 31:12 57:2 <b>forth</b> 43:24 78:6 168:18 <b>forthcoming</b> 163:17 <b>forward</b> 67:20 114:5 176:1 191:18,22 <b>found</b> 36:10 77:2 152:17 186:17 <b>four</b> 10:24 11:15 18:4,8 19:4 20:18 32:16 33:20 34:5 36:13 179:7 180:11 <b>fourth</b> 11:22 <b>framing</b> 17:2 <b>frankly</b> 20:1 21:11 45:6 57:4 61:3 67:5 180:21 190:22 <b>frantom</b> 135:16 143:24 185:18 185:23 187:9 <b>free</b> 97:8 <b>frequently</b> 12:1 <b>friedman</b> 33:15 65:12 66:8 <b>front</b> 13:23,24 41:4 44:7 45:14,24 61:22 89:19 90:20	116:12 <b>fruitful</b> 11:6 14:11 15:12 <b>fry</b> 4:5 8:3,7 70:15,16,19,20 71:15 72:16 73:2,6,11 74:8 76:5 77:12,22 78:2 79:2 80:5 80:13,22 81:3 81:9,22 83:8 83:20 84:10 85:3 86:3 89:6 91:2,9 92:15 93:20 94:19 95:17 96:4,5 101:3 108:2,5 109:12 110:7 110:23 111:20 112:3,6 117:23 118:4,10,19,22 120:6 122:5,19 123:9 124:15 124:23 125:2,7 125:17 128:16 128:21 129:21 131:8,19 132:19 133:3 134:12 135:6 136:20 138:16 139:11 151:15 151:19 152:4 159:9 160:13 165:16	<b>full</b> 171:23 182:10 <b>fully</b> 44:7 70:4 <b>fulsome</b> 46:14 76:22 <b>functionality</b> 184:4 <b>funder</b> 30:5,8 134:19 135:23 137:23,24 138:24 144:1 146:21 153:15 <b>fundes</b> 22:23 22:24 23:12 24:15 29:4 30:13 49:8 50:17 122:13 131:7,20,21 132:19 134:8 134:14 135:7 135:12,18 136:4 140:24 141:19,20 146:5 147:5 149:19 151:7 151:18,21 155:12,20 156:16 <b>funding</b> 11:20 23:17,18,20 24:10 27:24 28:1,4,10,20 29:13 33:23 56:2,19 68:17 68:20 69:7
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[funding - going]**

Page 22

136:3 146:2,8 146:15,16 147:22 148:16 148:21 149:3,8 149:13 150:18 152:18 154:4 154:12 156:7 157:5 164:20 <b>fundraising</b> 21:5 122:4 144:4 <b>further</b> 7:4 13:10 35:21 42:2 58:16 66:4,23 67:21 85:2,6 86:24 86:24 99:10 106:21 108:3 111:18,21 112:5,21 113:1 114:20 116:4 116:23 117:5 120:13,18 121:14,21 130:5,23 133:14 155:18 157:11 158:2 164:2,10 165:2 165:12 171:5 173:14 174:5 174:16,17 181:6 188:15 191:4,10,20 193:13 194:9	<b>future</b> 117:7 158:3 163:17 191:18 <b>g</b> <b>g</b> 6:1 <b>gain</b> 119:6 <b>gambling</b> 149:13 <b>game</b> 34:11 141:11 142:4 156:8 157:1 175:20 189:5 <b>garnered</b> 50:20 <b>gather</b> 150:14 <b>gatos</b> 3:17 <b>general</b> 17:3 145:12 155:15 <b>generally</b> 29:21 35:22 53:10 113:10 <b>generated</b> 51:2 <b>generating</b> 62:17 153:11 <b>georgia</b> 119:8,9 137:10,17 <b>getting</b> 15:1 16:23 59:15 98:1 116:13 166:15 180:10 <b>gist</b> 48:18 161:5 <b>give</b> 21:7 23:1 32:18 42:9 59:19 67:17 69:20 84:20,21	84:23 93:12 103:1 105:2 112:10 145:11 159:1 164:21 173:4,11 174:20 180:1 191:13 <b>given</b> 47:14 74:7 89:20 121:23 132:9 133:18 167:2 176:16 <b>gives</b> 69:21 <b>giving</b> 161:6,9 <b>gjohnson</b> 2:22 <b>glean</b> 23:15 <b>gleaned</b> 13:6 <b>gleans</b> 121:5 <b>go</b> 6:14 7:4 8:18 9:4 11:6 13:10 24:11 25:10 36:15 48:23 60:5 68:23 72:5 78:23 91:11 97:19 99:18,20 99:22 135:9 139:3 166:8 167:8 176:1,24 192:1 <b>goes</b> 17:2 37:20 51:3 54:9 56:4 119:7 120:10 132:3 136:5 157:16,22	<b>going</b> 8:14 9:9 12:4 14:6 15:12,24 22:19 23:6 25:24 32:21 36:23 40:21 64:18,20 69:21 70:14 73:10 74:23,24 75:2,3,7,11 82:15 84:14 95:10 97:22 99:15,19 100:7 112:10,11,23 112:24 114:14 114:17,23 117:13 121:13 132:24 133:1 134:21 142:9 142:24 146:11 150:13 153:13 155:1 157:13 157:19 158:11 158:21 164:6 164:11 165:1 165:22 166:8 166:16 168:19 170:19 171:1 171:15,16 172:1,2 173:1 173:21 174:20 174:24 175:5 175:24 176:4 176:11,13,17 176:19 177:5 180:2 188:23
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[going - herman]**

Page 23

188:24 190:8 191:1,18 <b>goldman</b> 2:4 7:11 <b>good</b> 6:9 7:9,22 9:2 32:23 70:15 75:19,19 76:2 78:16 95:12,15 118:21 157:15 157:19 165:19 172:24 185:14 186:17 192:2,2 <b>google</b> 176:2 185:7 <b>gotten</b> 45:12 53:4 56:24 77:5,10 113:16 144:7 <b>grant</b> 2:14 7:13 64:9 107:7 114:9,23 117:6 121:13 130:4 131:2 155:8 157:10 175:3 188:23 191:1 <b>granted</b> 158:3 176:20 <b>graphic</b> 21:5,11 21:17,18,22 22:3 <b>great</b> 11:1,2 33:6 158:17 163:19 169:6	<b>gregory</b> 179:6 <b>grimes</b> 4:20 <b>gripe</b> 182:2 189:5 <b>gripes</b> 175:16 <b>ground</b> 64:21 76:18 78:11 112:24 135:21 <b>grounds</b> 120:12 135:20 153:3,5 <b>grouped</b> 38:14 <b>grouping</b> 70:10 <b>guess</b> 12:24 29:17 48:10 53:10 56:4 81:20 87:10 103:7 134:3 136:17 140:20 146:14 159:23 169:20 175:15 <b>guidance</b> 141:4 164:22 <b>guys</b> 81:17 175:18 180:3 <b>h</b> <b>h</b> 5:1 109:18 <b>half</b> 8:21 32:16 186:18 188:12 <b>hall</b> 8:12 22:18 30:12 46:11 58:10 177:5,8 177:19,24 178:17 182:13 185:15 186:17 189:10,12	<b>hall's</b> 68:18 148:2 184:21 <b>hand</b> 66:9 67:3 134:4,7 172:8 178:16 <b>handle</b> 8:7 54:15 190:8 <b>handling</b> 9:13 <b>hanging</b> 64:10 <b>hanna</b> 2:13 7:13 <b>happen</b> 23:6 150:13 188:12 <b>happened</b> 13:24 18:22 24:2 42:17 43:12 44:5 67:15 85:17,21 113:2 131:18 138:13 180:7 182:8 <b>happening</b> 29:3 160:8,9 <b>happens</b> 59:23 117:20 <b>happy</b> 64:4 65:9 102:11 105:14 117:15 <b>hard</b> 134:12 153:14 <b>haroun</b> 32:3 <b>haste</b> 185:1 <b>hate</b> 57:5 <b>head</b> 65:3 67:7 76:6	<b>heading</b> 100:3 <b>hear</b> 33:2,4 35:7,8 38:13 40:11 60:9 62:4 63:19 68:24 69:10,17 70:17,18 87:14 <b>heard</b> 45:15 60:4 61:9,12 65:14 93:2 96:17 101:3 120:7 151:10 168:15 184:12 <b>hearing</b> 1:12 9:14 10:3 41:3 44:2,11 59:24 76:1 139:17 164:4 168:14 191:23 <b>hearings</b> 8:17 8:24 58:10 <b>held</b> 24:20 67:21 <b>helen</b> 178:9 <b>help</b> 87:16,18 89:4 95:5 99:23 128:1 139:12 <b>helpful</b> 15:6 39:23 <b>helps</b> 143:8 <b>hereto</b> 193:15 194:11 <b>herman</b> 4:22
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[hesitant - idea]

Page 24

<b>hesitant</b> 156:6 <b>hey</b> 88:1 110:16 169:17 <b>hicks</b> 102:21 180:24 <b>hide</b> 169:6 <b>high</b> 124:5 <b>highlighted</b> 143:18 <b>highly</b> 119:4 133:20 135:8 145:10 <b>hindsight</b> 100:16 <b>hint</b> 21:7 <b>hire</b> 17:10 <b>hired</b> 53:12 <b>hiring</b> 21:21 <b>history</b> 11:19 22:17 29:22 64:2 182:13 <b>hit</b> 76:5 <b>hitters</b> 46:18 <b>hodgepodge</b> 122:1 <b>hold</b> 96:3 101:18 <b>holding</b> 16:2 20:14 <b>holzen</b> 181:15 <b>honor</b> 7:10,22 8:10 9:12 11:7 12:6 13:9 14:2 15:19 27:6 32:23 34:4,5	34:14,17 36:16 37:6,11,12,22 39:3,12,24 40:12,16 42:2 42:3 43:23,24 44:7,11,20,24 45:2,5,10,14,20 45:23 47:7,13 48:24 50:14 51:24 54:6,8 54:24 56:21 57:4 58:19,24 59:8 60:1 64:8 67:24 68:1 70:15,17 71:3 71:15 72:16 73:6,11 76:5 76:12,21 77:12 78:2,8 79:2 80:13 81:3,22 83:8 84:10 85:7 86:3,21 89:6,18,20 91:5 92:15,24 93:20 94:19 95:12 96:5,15 99:21 100:5 102:12 104:17 107:14 108:6 109:12,15 110:8,24 111:20 112:7 117:11,16 118:4,19,22 119:1,20 120:6	120:20 122:19 123:9 124:15 125:2,7,17 126:4,24 127:13,20 128:21 129:6 131:19 133:3 134:15 135:6 136:10,20 137:15 138:16 139:9 141:6 144:11 145:19 146:1 147:12 148:22 149:7 151:19 152:10 153:1,9,22 154:1,15 159:10,17 160:14,20 161:3,14 165:18 168:6,9 170:4 175:3,7 175:22 180:13 182:9 184:3 185:8,23 186:3 188:17 192:5 <b>honor's</b> 7:15 8:13 16:9 38:13 44:5 58:1 65:7 71:3 139:20 <b>honorable</b> 1:15 <b>hope</b> 8:15,18 163:23	<b>hoping</b> 42:8 76:6 92:15 <b>host</b> 146:11 <b>hour</b> 8:19,20 8:21 167:17 <b>hours</b> 35:18 97:2,4,16 191:6,12 <b>house</b> 18:7 19:10,11,13 20:12 21:20 44:3 47:16 59:11 60:23 74:22,24 75:22 97:21 102:16 102:18 <b>how'd</b> 75:14 <b>hundreds</b> 17:9 <b>hurried</b> 60:13 <b>hypothetical</b> 49:2 50:3 51:5 79:9 105:1,2 <b>hypotheticals</b> 108:14
<b>i</b>			
<b>i.e.</b> 10:21 98:6 <b>ianuzzi</b> 57:2,14 61:3,10 <b>ianuzzi's</b> 133:19 <b>idea</b> 46:24 69:10 74:21 75:16 115:15 167:8 172:1			

## [ideal - information]

Page 25

<b>ideal</b> 78:14	43:14 54:23	122:12 126:13	<b>inequitable</b>
<b>ideally</b> 171:7	55:2 94:4	130:13 141:19	34:17 35:19
173:19	139:13 142:22	148:16 151:8,8	36:4,13,23
<b>ideas</b> 128:7	<b>importantly</b>	173:9 176:1	37:4,23 38:7
<b>identified</b>	55:1	179:5,22 190:4	38:16 63:10,12
55:16 99:4,5	<b>imposed</b> 60:11	<b>inclusive</b> 164:8	<b>inexcusable</b>
158:24 162:10	61:13	<b>inconsistencies</b>	63:16
171:13 172:16	<b>impossible</b>	123:22	<b>infer</b> 28:21
181:11 183:5	189:8	<b>incorrect</b>	29:2,12 56:17
183:12 185:24	<b>improper</b> 60:6	166:19	150:12 153:9
186:1 187:11	61:3 70:22	<b>incredibly</b>	<b>inference</b>
<b>identify</b> 7:5	135:20	124:5	138:12 141:16
86:13	<b>imu</b> 16:1	<b>independently</b>	141:16,21
<b>identities</b>	<b>inappropriate</b>	39:6	150:20 156:15
135:12,18	132:7 153:5	<b>indicate</b> 121:5	<b>info</b> 81:18 92:6
136:4	<b>include</b> 28:13	<b>indicated</b>	<b>info's</b> 123:1
<b>identity</b> 122:13	86:18 126:13	179:17	<b>information</b>
131:7 135:23	127:14 128:22	<b>indicates</b> 66:23	11:3,4,16,16,18
144:1	160:18 163:2	88:24 90:21	11:20,22 12:7
<b>iii</b> 2:4	164:15 171:11	92:10 107:19	13:4,6,14
<b>immediate</b>	172:2,7,20	128:11	14:14,19,20
119:7,12	<b>included</b> 19:10	<b>indicative</b>	16:4,23 22:13
<b>immediately</b>	70:5 102:19	127:24	23:23 24:20
178:17 179:12	106:12,24	<b>indicia</b> 62:14	26:21 30:1,8
<b>impacts</b> 163:8	107:22 126:15	136:14	33:13,21,22
169:19	159:12 170:13	<b>indifference</b>	34:3 35:14
<b>implicate</b> 18:2	171:14 172:20	38:2	36:1 37:18
157:5	<b>includes</b> 16:7	<b>indistinguish...</b>	38:18 39:14
<b>implicated</b>	<b>including</b> 16:14	59:13	46:10 51:22
159:22	23:21 26:5	<b>individuals</b>	57:14,17 59:2
<b>implication</b>	28:13,24 29:5	109:21	59:4,7 64:9
101:5	29:15 30:4,11	<b>inducement</b>	65:22 68:16
<b>imply</b> 169:2	60:16 72:21	132:11 133:11	69:5 74:11
<b>important</b>	77:19 80:1,16	<b>industry</b> 49:23	76:11,20 78:9
14:17 35:2	86:11 96:1		79:14,24 80:6

**[information - investor]**

Page 26

85:22 87:1,5,6 88:5,8,12,15 89:2,23 90:5 90:10,17 91:18 92:8,18,19,22 92:24 93:3,9 94:3,3,22,24 96:8 98:15,19 99:9 103:20,22 107:20 108:15 111:13,22,23 113:6,14,16,17 115:1,8,13,19 115:21 116:4,9 116:16,16,17 116:20 117:13 118:2 120:3 121:21 122:9 123:8 126:9 127:15,18 128:22 129:2 130:2,7,13,22 131:13 132:2 133:24 135:24 136:9 137:8 138:18 140:2 145:5 147:21 148:15 151:6 154:23 155:17 181:13 183:7 184:10,15 <b>information's</b> 121:6 <b>informed</b> 51:6 179:10	<b>infringement</b> 29:10 <b>initial</b> 175:15 181:12 185:24 <b>initiating</b> 61:21 <b>innovations</b> 148:5 <b>input</b> 132:2 <b>insisted</b> 25:11 101:13 178:24 <b>insistence</b> 63:2 169:9 <b>insisting</b> 121:9 <b>instance</b> 28:10 102:3 154:6 <b>instances</b> 40:7 40:19 <b>instruct</b> 152:22 <b>instructed</b> 153:4 <b>instruction</b> 141:3 145:5 146:7 <b>instructions</b> 70:22 98:17 100:12 140:18 165:8 191:17 191:22 <b>integral</b> 34:12 47:23 <b>integrated</b> 18:15 <b>intellectual</b> 135:1 142:3 155:22 156:18	<b>intended</b> 99:5 <b>interact</b> 17:15 <b>interacted</b> 109:21 <b>interest</b> 30:17 30:21 61:24 136:6 147:7 <b>interested</b> 193:15 194:12 <b>interesting</b> 50:16 <b>interests</b> 30:14 <b>interfere</b> 155:3 <b>internal</b> 23:5 151:8 <b>interrogatories</b> 73:8 97:11 113:7 <b>interrogatory</b> 73:18 74:9 75:4,19 76:2,7 76:22 78:24 79:15 98:24 181:12 <b>interrupt</b> 13:19 54:20 77:4 132:20 145:17 <b>intertwine</b> 40:14 <b>interval</b> 12:21 13:2 <b>interviews</b> 79:3 86:23 91:4 98:19 119:21	<b>intricately</b> 18:19 <b>introduced</b> 184:5 <b>invalidity</b> 50:4 52:13 55:9 <b>invest</b> 47:2 48:20 94:5 153:13 <b>invested</b> 15:9 16:3,12,12 48:12,22 <b>investing</b> 15:2 33:23 48:3 62:7 145:23 <b>investment</b> 11:17 14:20,23 15:23 16:10,22 16:23 33:22 34:8 46:21,23 46:24 47:4,19 48:5,7,18 49:20,24 52:5 61:20 62:2,20 143:24 144:17 145:23 153:17 <b>investments</b> 48:11 56:1 94:8 104:6 122:4,4,12 131:6 144:4 <b>investor</b> 11:21 12:10 16:17,18 24:10 26:6,17 27:1,15 41:20
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[investor - issues]**

Page 27

41:22 48:2,16	141:18,19	34:3,18 37:8	162:23 163:7
49:16 101:21	142:13,16	40:15,23,24	163:12,14,18
101:24 102:3	144:17 145:11	43:17 55:14	163:19 164:17
102:14 104:21	146:4 151:8,17	56:18 57:11	165:22 166:24
104:24 105:3	151:22 152:20	58:1 62:8,11	168:20 169:15
122:16 131:12	155:11,19	66:18 67:12	170:6,20 171:4
131:13 136:3	156:16	70:8 71:8	171:18 172:6
138:24 153:13	<b>invitation</b>	72:14,15,17	172:19 173:2
<b>investors</b> 15:1	108:11	80:10,12,14,17	173:10 174:1
16:5,8,11,14	<b>involve</b> 159:24	80:24 81:1,11	174:12,18
22:21,23 23:11	<b>involved</b> 17:14	81:12,14,16	175:1,6,15
23:18 24:14,18	17:23 31:21	84:4,4,14 85:9	178:5,8 185:17
24:19 25:3	32:1,15 47:24	85:10 86:2	189:13 190:22
26:7 27:4,22	60:23 61:23	87:11 91:15	<b>issued</b> 32:5
27:22 34:11	162:7	95:14,18 99:13	37:9 124:18
37:18 38:20,21	<b>involvement</b>	100:24 101:3	177:6
46:23 47:11,12	122:15 158:9	108:4 111:6	<b>issues</b> 8:8 22:1
49:8,8,18 52:4	160:1	114:9,11,21,22	24:11 36:4
52:4 56:7,10	<b>involves</b> 23:4	116:2,14 117:9	37:4 38:12
57:9,19,22	<b>ip</b> 15:4 23:21	117:22 118:9	40:17 46:1
62:23 94:4	23:21 29:15,15	118:13,15	48:12,14,14
101:12 102:19	29:16 38:9	119:7,14	50:4 55:20,20
102:24 103:16	48:20 49:1	121:13 122:7	69:11 82:21,22
103:18,23	50:13 93:15	122:18 124:17	100:19 106:21
104:9 105:22	128:2 134:24	130:4,15 134:3	112:4,10,16,20
108:12 111:22	139:3,4 141:10	134:20 135:1,8	114:3,6 117:20
116:11 123:21	146:24 149:18	136:6 141:1,15	121:16 122:16
123:23 125:20	150:17 151:23	142:3 143:20	123:15 125:5
126:11 129:8	153:16 157:9	149:2,23	133:12 138:6
129:10,14	<b>irrelevant</b>	151:18 154:5	138:13 144:9
131:16,21	23:13 123:14	154:18 155:7	147:20 156:23
132:14,15	127:21,22	155:13,18,22	159:7 161:1
133:21 134:6	<b>issuance</b> 31:22	156:2,18,20	164:1,9 165:9
134:13 135:7	<b>issue</b> 23:22	158:4,15,18	168:11,18
140:3,4,8,22,23	28:4 33:11	159:1,17 161:1	171:10,12

[issues - know]

Page 28

173:8,18 174:13 181:14 <b>it'd</b> 122:11 <b>it'll</b> 87:18 95:5 158:17 <b>items</b> 126:13 <b>iteration</b> 166:7 169:8 <b>iterations</b> 165:24 167:19 167:19 168:22	58:10 68:18 74:19 75:16 97:20 113:8 132:10 148:2 149:15 174:10 177:5,8,19,24 178:6,17 182:13 184:21 185:15 186:17 189:10,12 <b>judges</b> 149:23 <b>july</b> 1:13 12:19 78:3 <b>jump</b> 10:8 33:7 53:1 72:24 99:22 139:8 144:12 <b>jumping</b> 81:7 <b>jury</b> 84:15 85:4 140:17 <b>justice</b> 185:14 <b>justify</b> 51:23 97:1 100:4 <b>justifying</b> 12:13	<b>kenneth</b> 102:21 180:24 <b>key</b> 10:20,21,23 49:18,18 57:20 66:5 78:18 98:2 181:14,21 187:23 <b>kind</b> 10:19 11:5 17:2 24:5 29:12 42:9 43:14 51:21,23 51:23 56:9 64:13 68:5,10 68:11,12,15 71:10 72:13 75:3,24 76:1 96:16 103:11 103:13,14 118:17 121:24 122:18 134:10 142:5,9 156:19 157:6 176:10 179:19 <b>kinds</b> 34:2 54:2 <b>king</b> 1:17 2:6 3:7 20:6 <b>knew</b> 88:2 184:9 <b>know</b> 6:10 8:19 9:21 10:11 11:1,2,15,18 12:10,18,18,22 13:17 14:10,13 14:16,17,22,23 15:4,6,8,11,11	15:14,14 16:15 16:21,23 17:2 17:4,6,8,10,11 17:13,14,16,18 17:20 18:1,7 18:10,10,11,15 18:18,18,20,23 18:24 19:8,9 20:2,11 21:3,6 21:8,10 22:4 22:11,13,14,16 23:4,7,11 24:1 24:5,8,9,14 25:14 26:4 27:9,9,16,18 28:6,11,21,23 29:2,6,6,8,8,9 29:11,20,22 31:7,19 32:6 33:10,11,14,16 33:17,21 37:23 38:20 40:21 42:6 45:4 46:24 48:15,21 48:21,22 51:22 53:7,14,16,18 53:22 54:3 56:2,8,16 57:24 63:17,23 64:1,5,8,21 65:5 66:10,17 66:20 68:9 69:8 70:1,11 71:6,10,12,19 71:24 73:24
<b>j</b>	<b>j</b> 118:10 <b>jacobey</b> 194:2 194:15 <b>january</b> 188:5 <b>jlh</b> 1:8 6:24 <b>jo</b> 31:12 <b>job</b> 1:20 <b>johnson</b> 2:14 7:13,16 175:2 175:3,4,13,22 176:15 177:8 177:16,22 178:6 179:23 180:13,19 181:5,8 188:15 <b>joined</b> 7:10,24 8:3 <b>jointly</b> 174:7 <b>joseph</b> 179:6 <b>judge</b> 8:11 22:18 30:12 35:1 36:10 41:3 46:11	<b>k</b>	
	<b>kantaros</b> 109:23 <b>keep</b> 8:23 31:3 32:18 146:4 174:22 <b>keeping</b> 121:9 <b>keeps</b> 55:21 <b>kelly</b> 3:3 7:23		

**[know - legal]**

Page 29

74:3,4,6,16,19 75:14,22,22,24 78:5 81:16 82:21 83:22 84:20,21,23 85:10,11 87:14 87:14 88:13,17 88:18,22 90:14 90:15,22 91:11 92:4,4 93:13 94:17 96:12 97:16,19,20,21 97:24 98:9,22 98:24 99:2,9 99:16 100:1 101:1,20 102:23 103:15 103:18 105:19 107:6 109:1,8 109:9 110:17 110:19 117:24 118:13 125:8 125:10,19 127:23 128:12 128:17 129:19 129:20 138:3,4 138:6 140:22 144:18 146:7 147:1,4,6 148:1,10 150:9 153:15,22 154:10,12 156:5 157:18 160:6,6,7,10,19 162:19 168:13	169:5 174:18 174:19 175:10 175:16 177:12 179:23,24,24 182:4,15 186:13 187:21 189:15 190:15 190:23 191:5 <b>knowledge</b> 16:16 28:9 44:10 47:2 56:14 63:20 64:22 65:16,18 66:24 193:10 194:6 <b>knowledgebase</b> 65:21 <b>known</b> 185:20 <b>knows</b> 52:23 66:21 <b>I</b> <b>I</b> 109:18 <b>labeling</b> 112:16 <b>laches</b> 37:7,21 38:1,6,17 39:6 63:14,15,20 <b>lack</b> 99:13 131:10 185:13 186:16 <b>lacked</b> 186:17 <b>laid</b> 45:17 <b>lardner</b> 20:5 88:10,14 90:18 103:13 106:1 109:5 115:4,14	123:12 <b>large</b> 17:9 25:18 67:3 156:5 <b>largely</b> 13:7 17:11 42:18 80:15 117:13 179:4 <b>larger</b> 164:24 <b>lastly</b> 158:19 <b>late</b> 37:15 175:20 176:10 188:6 189:4,7 189:12 <b>latham</b> 4:8 8:2 32:24 70:16 <b>laurie</b> 3:14,18 8:5 <b>law</b> 4:22 10:13 20:5 30:10 35:3 93:5 130:12 142:21 152:21 153:1 156:4 177:13 <b>lawsuit</b> 72:9,22 76:16 184:6 <b>lawyer</b> 18:5,5 18:13,14 54:3 59:11 88:11,14 88:19 90:12,18 91:20 92:7 93:2,12,15 97:21 106:2 160:10 161:5,9 169:14,18,18	190:8 <b>lawyers</b> 32:14 74:24 75:15 110:4 115:4,5 125:11,21 137:7 140:15 <b>layer</b> 57:5 <b>laying</b> 58:12 <b>layton</b> 3:5 4:23 7:23 <b>lead</b> 7:12 17:16 39:20 54:3 59:10,11 <b>leader</b> 152:15 <b>leading</b> 18:16 <b>leads</b> 23:14 <b>leaning</b> 141:11 <b>learn</b> 76:20 <b>learned</b> 86:24 88:5 133:19,24 136:21 <b>leave</b> 143:10 184:20 189:22 <b>led</b> 17:11,16 60:15 <b>left</b> 183:18 <b>legal</b> 18:3 20:10 21:6,9 21:20 22:10 26:9,11,14 49:23 55:20 82:19,22 88:21 89:13 93:24,24 106:5,18 109:7 110:5,17 115:5
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[legal - litigation]**

Page 30

115:23 126:13	<b>license</b> 34:10	<b>limine</b> 100:3	19:21 22:22,24
142:11 145:6	50:22 52:10,11	<b>limit</b> 117:17	23:2,12,19,22
160:10 161:6	55:7 60:21	<b>limitations</b>	24:10,14 25:16
161:10 162:5	72:8 81:13	60:11	27:17,23 28:1
166:13 170:12	83:13,24 99:5	<b>limited</b> 1:9 26:9	28:4,9 29:13
<b>legally</b> 31:20	99:9 114:13	58:1 137:12	29:23 30:5,8
<b>letter</b> 53:21	119:6 130:1	183:18 184:21	30:13 33:23
68:9,10,14	<b>licensees</b> 51:14	<b>limiting</b> 146:22	34:19 37:24
71:6,19 81:2	120:24	<b>limits</b> 61:8	38:11 49:8
81:15,18,24	<b>licenses</b> 54:11	142:19 146:9	50:13,22 51:12
82:7,18 83:23	54:12 99:4	<b>line</b> 7:11 8:5	51:13 53:14,20
84:3,3,9,15	123:4	65:22 101:10	55:4 56:1,18
85:1,5 89:8	<b>licensing</b> 11:19	101:10 104:20	60:20 65:19,19
99:13,14,17	17:6 33:24	109:15 126:13	68:17,19 69:7
100:9,12	34:9 47:20	134:13 136:24	118:24 122:13
109:13 110:22	49:3 50:20	<b>lines</b> 27:19 89:9	131:7,20 134:8
114:19 118:5	51:11,17,21	144:6	134:14 135:7
118:11 120:22	52:1 53:8,15	<b>linger</b> 67:6	136:3 137:23
123:14 128:10	53:18 54:15,22	<b>lingering</b> 12:23	138:3,24 139:4
128:22 129:7	55:5 57:10	<b>linh</b> 4:6	139:23 140:14
147:19,20	60:17 82:14,18	<b>list</b> 11:13 68:13	140:23 141:19
148:8 152:21	100:9 119:5,13	69:16 77:23	141:20 142:23
159:12 169:13	137:13 150:16	159:22	144:1 145:12
170:5 174:14	153:11 156:14	<b>listed</b> 21:3	146:2,5,8,15,16
190:14,17	<b>lifeline</b> 48:6	171:20	147:5,11,22
<b>letters</b> 60:19	49:13,14	<b>listen</b> 9:22	148:16,21
68:8 83:11,15	<b>light</b> 6:14	<b>listening</b> 9:19	149:8,13,19
96:19,22 109:4	114:14 151:22	10:5	150:9,18 151:2
120:24 142:9	158:10 163:19	<b>lit</b> 28:20 149:3	151:3,17
161:5	176:3 179:20	164:20	152:18 154:4
<b>level</b> 33:11	<b>likely</b> 18:12	<b>literally</b> 73:3	154:11 155:12
65:15 135:23	60:15 138:12	<b>litigating</b> 18:18	155:14,20
<b>liability</b> 1:9	141:21 150:9	150:16 156:14	156:7,16 157:5
156:23	150:12,17	<b>litigation</b> 11:20	162:12
		16:24 17:7,10	

## [litigations - make]

Page 31

<b>litigations</b> 36:8 50:21 61:21 63:7 124:19 125:1 144:16 <b>little</b> 18:14,17 21:15 28:17 56:2 191:6,7 <b>live</b> 133:12 170:21 <b>llc</b> 148:5 <b>llp</b> 4:8 <b>loan</b> 61:24 62:1 <b>location</b> 1:16 <b>log</b> 21:4 46:1 68:15,21 69:8 69:13 71:7 86:12,13,18 87:7 135:23 136:1 149:2 157:3 158:20 159:13 161:1,7 162:6 163:24 165:24 167:19 168:23 170:20 171:4 <b>logged</b> 68:18 68:20 86:17 149:3,4,4 157:4 159:13 <b>logical</b> 11:8 <b>long</b> 99:14 100:6 157:14 182:12,15 185:13,19 190:24	<b>longer</b> 53:11 118:1 122:24 131:10 <b>longstanding</b> 167:3 <b>longwinded</b> 57:24 <b>look</b> 10:20,23 14:22 17:4 20:19 22:8 42:22,24 43:2 43:3,7,10 46:22 55:7 67:22 69:15 74:21 75:3,6 76:2 77:23 78:17 81:18 82:15 85:15,19 86:16,17 88:1 88:4 97:18 99:14 100:11 103:9 110:16 110:18 111:7 116:6 124:12 142:1 149:16 161:5 162:20 163:13 168:10 168:24 174:4 182:3 190:11 191:20,22 <b>looked</b> 21:12 33:9 72:2 <b>looking</b> 72:18 143:17 148:8 148:18 165:10	<b>looks</b> 90:9 91:12 99:23 101:23 117:23 131:8 <b>los</b> 3:17 <b>loss</b> 126:12 127:14 <b>lot</b> 10:15 12:21 15:5 39:2 51:20 53:17,19 54:3 64:20 169:4 186:2 <b>lots</b> 14:24 17:13,14 18:2 21:8 51:11 56:13 103:22 191:15 <b>love</b> 111:14 <b>lumpsum</b> 79:12 119:11,14 <b>lunch</b> 134:22 <b>lw.com</b> 4:11,12 4:13,14 <b>m</b> <b>made</b> 15:16 16:22 35:2,9 44:9,12 45:7 46:13 56:22 59:21 60:7 66:15 82:7 110:12 114:15 115:17 116:2 121:19 125:15 125:21 130:6 132:5 136:22	144:5 148:20 152:12 157:23 168:5 172:13 183:17 188:12 188:23 <b>mailchimp</b> 132:1 <b>main</b> 31:3 98:22 149:10 <b>maintain</b> 146:7 <b>maintained</b> 133:16 148:15 <b>maintaining</b> 21:21 <b>major</b> 16:8 149:8 <b>majority</b> 16:11 161:18 188:9 <b>make</b> 17:23 43:17,19,23 45:13 47:4 50:10 54:8 55:16 65:10 75:6 78:8 83:19 90:3 92:23 93:1,3 100:20 107:7 112:4 114:4,6 126:19 132:21 137:20 140:15 141:16,20 142:24 154:2 157:19 158:11 159:2,5 163:20 174:21 187:21
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[makes - mischaracterizes]

Page 32

<p><b>makes</b> 9:7 45:2 48:1,7 150:7 190:15 <b>making</b> 13:7 24:4,6 45:11 55:1 56:12 64:23 82:19 90:21 114:3 136:14 138:14 150:15 173:22 <b>management</b> 161:20 <b>manhattan</b> 2:17 <b>march</b> 12:19 13:12 42:13 175:20 176:10 177:7,18 185:19,19,19 186:3 187:6,12 188:5,6,7 189:6 <b>marial</b> 7:13 <b>mariel</b> 2:15 95:13 <b>marked</b> 5:3 168:1 <b>marketed</b> 50:16 51:2 57:20 <b>martinez</b> 181:15 <b>material</b> 139:2 154:12 159:5</p>	<p><b>material's</b> 67:7 <b>materials</b> 25:4 86:14,17 91:12 122:16 <b>matter</b> 6:22 7:2 7:3 8:10 43:1 106:4 107:17 122:24 130:23 133:22 142:1 152:16 153:7 155:10 156:19 157:8 158:7,10 185:6 190:9 <b>matters</b> 6:18 19:21 20:12 26:10,13 38:16 39:21 160:12 <b>mc</b> 6:20 <b>mckool</b> 2:16 7:12 20:7 95:13 <b>mckoolsmith....</b> 2:20,21,22,23 <b>mean</b> 13:10 16:5 20:9,19 22:10 24:19 27:7 28:2,2 29:24 31:6 65:18,19 67:11 67:17 78:21 82:11 100:16 101:23 107:4 107:11 110:10 129:21 134:17 134:20 138:10</p>	<p>138:19 151:9 177:20,22 180:7 190:18 <b>meaningfully</b> 163:11 <b>means</b> 120:17 <b>meant</b> 100:11 155:3 188:11 <b>meet</b> 58:4 59:1 164:2,10,14 165:2,12,22 166:2 167:18 171:5 186:6 <b>meeting</b> 18:9 20:1 <b>meetings</b> 23:6,8 27:21 28:12 49:16 71:12 122:3,12 131:6 131:16,18 148:13 156:15 <b>member</b> 9:24 49:18,19 <b>members</b> 10:4 <b>memory</b> 117:14 185:22 <b>memos</b> 64:13 <b>mention</b> 12:4 38:15 78:3 107:15 <b>mentioned</b> 12:1 39:10 60:10 61:2,14 110:21 136:12</p>	<p><b>merged</b> 44:4 <b>metadata</b> 161:15,21 162:23 163:7 172:19 <b>metzer</b> 8:12 <b>metzler</b> 3:4,10 7:24 <b>microsoft</b> 31:18 32:1 34:20 35:15,22 50:21 61:21 126:22 140:1 <b>microsoft's</b> 35:13 36:3 <b>mid</b> 47:9 166:11,11 <b>middle</b> 46:5 <b>million</b> 47:11 143:23 145:22 153:15 <b>mind</b> 75:17 91:18 134:3 <b>mindful</b> 35:19 <b>mine</b> 63:20 <b>minimum</b> 29:12 77:23 121:16 136:1 156:20,24 <b>minute</b> 11:12 <b>minutes</b> 191:12 <b>miscellaneous</b> 6:18 7:1 9:5 <b>mischaracteri...</b> 148:14</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## [misremembering - netflix]

Page 33

<b>misremember...</b> 147:19 149:20	37:14 42:20 46:17 59:22	<b>multiplied</b> 167:4	70:3 76:3 77:23 99:9
<b>misrepresent...</b> 38:10	64:9 67:22 69:6 70:21	<b>mute</b> 9:11 59:23	112:3 114:4,5 121:12 124:10
<b>misrepresent...</b> 60:7	97:14 100:3 112:15 158:8	<b>mutually</b> 154:23 160:15	125:13 146:4 150:3 164:23
<b>missing</b> 59:6 60:13 151:11 187:23	158:15,22,23 163:18,20 170:21 171:2 174:8 188:24 191:1,21	<b>n</b>	167:5,24 171:17 172:5 172:23 174:1 174:16 176:17 178:20 188:21
<b>mix</b> 169:4	<b>motion's</b> 34:2	<b>n</b> 2:1 3:1 4:1 6:1	<b>needed</b> 26:9 49:12 76:18 121:6 183:20 184:16 186:7
<b>moments</b> 40:12	<b>motive</b> 16:21 65:4	<b>nail</b> 76:6	<b>needle</b> 64:1
<b>monday</b> 1:13	<b>mouth</b> 87:15	<b>name</b> 109:18 109:20 160:18	<b>needless</b> 146:12
<b>money</b> 23:1 48:21 50:12 123:24 125:4,4 125:9,12,20,22 135:19 140:1 140:15 145:24 153:14	<b>movant's</b> 10:7	<b>names</b> 88:11	<b>needlessly</b> 167:4
<b>monies</b> 127:10 128:18	<b>move</b> 58:15,17 59:22 68:2 112:3 117:8 167:24	<b>narrow</b> 59:1	<b>needs</b> 17:10 139:12 170:22
<b>month</b> 176:20 186:4	<b>movement's</b> 10:7	<b>narrowed</b> 40:5 40:9	<b>nefarious</b> 169:2
<b>months</b> 64:10 165:23 168:5 168:20 186:19 187:13	<b>movements</b> 9:10	<b>narrows</b> 139:14,18	<b>negotiation</b> 49:2 50:4 51:5 79:10
<b>moot</b> 114:14,21	<b>mover</b> 120:24	<b>nature</b> 150:11	<b>neither</b> 130:11 193:11 194:7
<b>morning</b> 6:17 7:9,22 32:23 40:2 70:15 95:12,16	<b>moving</b> 8:23 32:18 67:20 114:5 166:1,5	<b>navigating</b> 104:17	<b>netflix</b> 1:8 3:2 3:15 4:2 6:19 6:23 7:24 8:6 12:8 16:16 25:11,22 33:1 41:19,23 60:11 70:17 72:18,20 72:22 73:13,22
<b>motion</b> 8:20 9:4 9:6,8 28:19 34:18 35:1,6	<b>mtalmage</b> 2:23	<b>near</b> 164:18	
	<b>multiple</b> 63:6 66:5 83:12 94:8 132:3 152:4 166:2 167:17,18 192:4	<b>nearly</b> 59:13	
		<b>neat</b> 164:11	
		<b>necessarily</b> 134:19 138:23 139:1 156:7 161:23	
		<b>necessary</b> 64:8 176:5,19,23 178:3	
		<b>need</b> 8:14 11:2 11:2 42:23 58:15 66:3 67:8 69:24	

**[netflix - obtain]**

Page 34

73:24 79:10,19 80:17 81:4,17 81:22,24 82:2 82:7,14 83:10 83:23,24 84:9 84:16 85:5 86:9,11 87:2,6 90:4 93:7 94:21 96:17 97:6 100:6 101:11 104:20 105:5 107:23 119:17,24 120:21 123:14 123:17,21 124:6 129:22 132:6,8,13 133:8,10,15,15 135:15 138:9 142:8,16 143:12 145:9 148:13 151:11 154:7 159:14 165:20 177:2 178:8,10,16,18 178:22,24 179:10,14,16 180:15,20 181:18 183:5 184:5 <b>netflix's</b> 37:7 37:20 63:2 70:21 76:12 86:4 89:7 94:11,23 101:8	104:13 106:10 108:10 118:10 121:4 126:8,14 127:7 129:6 132:8 159:11 169:1,8 176:1 181:13 184:13 186:14 <b>netflix.com</b> 3:18 <b>netted</b> 123:3,18 125:21 <b>never</b> 19:22,24 20:9 27:5 58:22 78:18 101:22 102:5 103:16 108:24 110:12 142:19 166:18,18,22 181:2,18 182:5 183:22,24 184:19 190:23 <b>nevertheless</b> 128:17 171:22 <b>new</b> 2:19 34:16 41:4 70:21 129:10 174:6,9 <b>newer</b> 174:19 174:19 175:10 <b>nine</b> 53:15,23 <b>non</b> 9:21 35:13 35:24 38:15 59:16 <b>nondisclosure</b> 147:7	<b>nonfee</b> 125:15 <b>noninfringem...</b> 55:8 <b>nonlegal</b> 106:6 <b>north</b> 1:17 2:6 3:7 <b>northwest</b> 4:9 <b>notary</b> 193:19 <b>note</b> 16:5 34:24 107:15 129:5 150:21 151:24 152:21 181:8 <b>noted</b> 47:21 59:6 119:2 <b>notice</b> 81:2,17 83:16 84:9 85:1 175:18 177:10 178:9 178:11,16 182:17,18,20 185:16 186:13 187:4,5 <b>noticed</b> 176:6 177:1,17 178:9 179:1 182:2,23 183:2,15 185:17 186:22 188:5,6 189:4 189:6 <b>notices</b> 177:7 182:16 <b>notion</b> 63:9 <b>number</b> 6:20 6:24 40:1,13 42:9,23 44:12	67:17 74:6 75:23 77:1 112:23 113:5 118:8 119:9 128:12 148:5,6 <b>numerous</b> 57:15 <b>ny</b> 2:19 <b>o</b> <b>o</b> 6:1 <b>o'clock</b> 8:11,12 174:15,23 <b>oath</b> 47:14 166:12 <b>object</b> 45:9 <b>objection</b> 120:11,13 121:18 148:20 157:22 158:6 159:9 <b>objections</b> 28:2 144:4 <b>objective</b> 62:13 136:14 <b>obligation</b> 36:9 <b>observation</b> 35:2,10 44:5 <b>observations</b> 44:1 <b>observed</b> 37:12 <b>obstruction</b> 41:24 <b>obtain</b> 78:10 80:6 119:6
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[obtained - order]

Page 35

<b>obtained</b> 13:21 14:15 79:19 94:8,24	<b>offers</b> 179:20 <b>office</b> 7:24 36:10	118:12,20 120:5,7 121:11 121:22,24	<b>opening</b> 54:14 78:4 86:21 89:8 112:17
<b>obtaining</b> 79:20 93:24 123:18	<b>officer</b> 193:2 <b>official</b> 75:5 <b>oh</b> 9:23 14:6	122:5,20 124:20 125:24 127:1,8 128:15	114:18 118:11 120:22 129:6 169:13 172:14
<b>obviate</b> 30:8 76:3	59:23 61:19 81:6,9 84:24	128:15 129:15 130:3 131:4	<b>operating</b> 17:20
<b>obviously</b> 10:12 21:15 52:2,3 100:6	91:7 101:20 103:21 120:6 136:20 188:20	134:2,16 141:13 143:5 146:22 147:16	<b>opinion</b> 78:6 79:7 88:12 95:2 101:16
170:7 177:22 177:24	<b>okay</b> 6:6,9 7:18 8:15 9:2,15 11:9 12:15	148:7 150:6 151:14 152:9 153:24 154:14	106:16 109:6,8 110:17,18 115:5,13
<b>obviousness</b> 137:16	14:4,18 17:1 21:2 22:15	154:18 161:4 163:6,13 167:5	184:14
<b>occasionally</b> 150:8	24:13,17 27:11 27:23 30:22	168:7,12 170:15,19	<b>opportunities</b> 167:17
<b>occur</b> 178:20 178:21 184:24	31:2 32:17 33:5 46:16	174:4,11 175:4 175:9 178:4	<b>opportunity</b> 43:2 56:21
<b>occurred</b> 13:11 14:3 15:7	51:10 55:23 58:14 59:17,23	181:23 185:16 187:9 188:13	60:2,22 65:2 69:21 100:17
178:24 179:7 181:2	65:23 67:20 70:12,17 71:5	188:20 189:1 192:2	184:16
<b>ody</b> 4:23 8:1	71:17,22 78:13 79:21 80:9,21	<b>omnipresent</b> 18:15	<b>oppose</b> 166:10
<b>offense</b> 60:8	81:9 85:1,8 87:19 90:7	<b>once</b> 58:20 <b>ones</b> 12:1 16:14	<b>opposed</b> 79:12 117:14 119:11
<b>offer</b> 41:8 82:14 101:13	93:17 94:12 95:4,15 96:6	28:22 68:12 100:19 166:24	186:8
180:8 190:12 190:19	99:12 100:22 105:9,10,23	180:10 <b>ongoing</b> 166:5	<b>opposition</b> 106:12 109:13
<b>offered</b> 101:11 101:15 104:8	106:20 108:1 108:23 112:2,9	<b>onus</b> 168:2 <b>open</b> 100:6	118:5 170:5
180:5,7,12,14 182:4 188:10	117:22 118:7		<b>option</b> 181:3
<b>offering</b> 166:13 184:14			<b>order</b> 67:12,22 69:22 70:3,8
			95:23 112:14 115:11,23 155:7 157:21

**[order - parties]**

Page 36

158:2 159:18 167:24 184:21 188:8 191:20 <b>ordered</b> 31:20 46:11 191:5 <b>original</b> 175:17 189:6 <b>originally</b> 61:16 163:4 <b>outcome</b> 42:20 136:7 177:23 193:16 194:12 <b>outreaches</b> 52:7,19 <b>outset</b> 73:12 168:2 <b>outside</b> 17:15 17:21 18:5,12 19:14,20 22:14 25:12 28:6 44:2 50:22 51:11 59:12 85:19,22 86:14 89:23 92:20,21 94:9 101:17 106:14,17 107:20 110:19 117:2 146:10 151:2 <b>outsiders</b> 49:21 <b>outstanding</b> 176:18 <b>overall</b> 122:2 <b>overarching</b> 30:19	<b>overinclusive</b> 11:13 <b>overlap</b> 10:16 69:3,4,7 <b>overlaps</b> 39:3 <b>oversight</b> 128:14 163:10 <b>owe</b> 74:6,18 95:19 <b>owed</b> 112:22 <b>owes</b> 72:4 <b>own</b> 19:11 33:21 60:14 61:4 63:11,18 102:16,23 126:8	<b>pages</b> 85:10,15 85:20 87:21 91:13,17 151:10 <b>paid</b> 47:13,19 48:16 102:19 105:22 123:13 126:11 127:11 128:18 <b>papers</b> 34:23 37:13 39:17,19 44:6,22 45:11 68:4 108:24 139:16 148:24 156:3 163:12 <b>paragraph</b> 107:1,1 117:9 148:12 190:15 <b>parcel</b> 106:18 <b>parent</b> 32:1 <b>part</b> 14:11 20:6 27:21 34:12 39:1 52:14 54:17,21 56:13 68:10,14 78:19 84:2 87:12,19 101:16 106:17 114:2,24,24 131:11 148:11 155:8 162:4 163:10 164:16 170:21 171:10 181:21 <b>participate</b> 27:18 178:22	<b>participated</b> 51:13,17 <b>participating</b> 19:24 63:5 <b>participation's</b> 161:8 <b>particular</b> 27:8 37:14 40:22 41:18 49:6 50:21 54:11 57:2 58:1 59:20 76:13,24 88:11 110:11 116:5 119:5 156:10 166:23 187:18 <b>particularly</b> 47:1 52:22 72:18 91:13 104:14 135:1 152:19 156:10 179:20 <b>parties</b> 10:1,1 10:13 22:17 26:24 33:12 34:9 38:3 49:21 50:17 51:6,12 52:18 66:14 67:2,4 67:13 68:24 73:12 94:9 105:12,16 111:11,17 114:5 115:22 116:18 117:2,6
	<b>p</b>		
	<b>p</b> 2:1,1 3:1,1 4:1,1 6:1 126:10 129:6 <b>p&amp;l</b> 129:23 <b>p.m.</b> 192:7,8 <b>pa</b> 2:5 3:5 4:24 <b>pacific</b> 119:8,9 137:10,17 <b>page</b> 81:15 83:22 84:11,13 89:8,10 101:9 101:10 104:13 104:19 109:14 110:18 112:17 120:21 126:10 126:21 148:12 158:23 164:5 174:7		

[parties - perspective]

Page 37

132:22 133:6,7 136:8 142:2 143:3,14 145:6 146:17 154:20 154:23 155:4 155:16 157:12 158:16,22 164:2,14,21 167:3 171:4 173:4,20 174:5 174:7 180:22 184:22 186:23 187:1 191:2,7 191:13,14,22 193:12,14 194:8,11 <b>partner</b> 17:12 17:16 20:5 <b>parts</b> 9:6,6 <b>party</b> 23:4 25:3 30:5 38:21 50:3 53:22 55:7 57:1 61:5 101:21 102:4,8 102:15 109:16 133:21,24 150:7 165:21 177:2 181:1 183:13 185:6 <b>passage</b> 41:10 <b>past</b> 58:10 64:2 100:10 113:9 <b>patent</b> 11:18 17:6 19:20 22:1 25:23	26:13 27:16 31:7,11,21,23 32:1 33:24 36:10 48:1 50:13 51:11,12 51:16,17,21 54:22 61:15 88:22 94:6 138:1,2,5,7 142:23 <b>patents</b> 11:23 27:17 29:5,5 29:22 31:16 32:5 37:8,9,20 51:14 57:10 63:8,16 83:24 124:13,14,16 124:21 128:7,8 135:8,10,11 141:1,23 143:13,15 144:9,10,15 145:12 147:10 150:11,16 151:21 152:8 155:13 156:14 184:5 <b>path</b> 24:7 <b>pause</b> 95:4 125:24 153:22 <b>pay</b> 125:11,19 127:12 128:5 <b>paying</b> 123:4 123:19 125:18	<b>payment</b> 130:14 <b>payments</b> 125:15 128:19 129:17 130:8 <b>pc</b> 2:16 <b>pending</b> 32:2 64:18 133:12 <b>pennsylvania</b> 193:20 <b>people</b> 15:2,5 17:13,19,20,22 18:4,8,16 19:4 20:16 22:24 43:2,8,11 47:2 48:12 53:5 104:1 140:14 <b>perceived</b> 135:10 <b>percent</b> 14:23 46:22 <b>percentage</b> 74:4,5,12 77:16,17 <b>perfectly</b> 11:8 <b>performed</b> 77:18 85:13 102:16 108:6 110:1 <b>period</b> 15:9 17:12 19:9,13 19:19 47:8,10 48:3 62:19 103:24 105:15 129:24 140:7	146:18 160:20 167:12 172:11 172:22 175:17 176:8,22 178:21 179:3 180:5 183:19 189:13 <b>permission</b> 7:16 8:13 <b>permit</b> 120:18 138:22 <b>permitted</b> 96:10 121:17 143:2 146:18 191:10 <b>permitting</b> 172:24 <b>persistently</b> 46:10 <b>person</b> 18:17 19:2 22:5,14 28:23 49:2 53:6 56:12 66:21 74:22 183:14 <b>person's</b> 74:24 <b>personal</b> 28:12 34:7 46:20 49:23 62:5 <b>personally</b> 13:15 <b>personnel</b> 28:13 <b>perspective</b> 47:4 56:9
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[perspective - post]

Page 38

66:10 122:4 141:5 <b>pertinent</b> 94:23 <b>ph</b> 28:13 31:10 31:10 181:15 <b>place</b> 31:22 33:7 37:13 44:22 128:11 130:21 147:4 <b>places</b> 98:18 145:3 <b>plaintiff</b> 1:6 2:2 11:17,19 34:20 38:22 46:21 47:2 50:10 53:13 56:5 66:13,15 69:17 69:20 70:2 72:4,8,11 73:4 81:1,12 87:20 95:7,11,14 99:15 101:2 109:4 112:22 114:12,17 115:6,17 116:2 116:10 117:4 118:1 122:10 122:23 127:11 130:20 131:7,9 136:13 137:22 141:17 142:23 145:24 150:14 152:11 156:11 158:23 159:1 160:5 161:2	165:4 172:9,15 172:18 173:11 173:12 174:18 189:3,12,17,20 189:24 190:20 <b>plaintiff's</b> 7:7 8:22 10:12 14:22 25:2,5 42:21 43:19 47:3 66:10,14 69:14 87:24 88:3 96:8 113:4 126:1 127:12 132:22 141:14 160:23 175:1,10 188:24,24 190:16 <b>plaintiffs</b> 9:10 <b>plan</b> 165:13 <b>plan's</b> 172:1 <b>planned</b> 99:3 <b>plans</b> 57:10 <b>platform</b> 161:20 <b>plausibly</b> 28:21 <b>play</b> 19:19 44:16 <b>played</b> 19:22 27:14 48:9 <b>playing</b> 12:12 118:18 123:6 <b>pleading</b> 63:11 <b>plenty</b> 126:8 142:21	<b>plethora</b> 57:13 <b>plus</b> 97:2,4 <b>point</b> 38:13 41:17 42:22 43:22 44:19,20 45:13 55:2 63:21 64:23 65:10 75:2 83:9 85:6 89:18 91:5 92:23 94:8 96:22 97:18 98:23 100:11 100:19 108:9 121:10 128:10 131:20 132:5 132:18 139:13 142:19 143:10 145:8 154:2 160:21 178:14 183:22 188:4 <b>pointed</b> 52:8,22 52:23 84:11 96:21 104:7 109:3 110:24 111:1 128:22 129:6 131:23 135:22 <b>pointing</b> 55:21 129:22 130:8 137:3 <b>points</b> 45:10 64:13 89:6 108:5 119:21 142:8 152:11	<b>ponce</b> 175:14 178:9 179:11 179:17 181:9 181:11,16 182:7 183:4,5 183:11,14,18 184:9,14 190:16 <b>ponce's</b> 175:19 189:1,19 190:21 191:2 <b>portion</b> 9:14 148:23 <b>portions</b> 142:8 143:18 <b>position</b> 25:2 25:22 45:1 55:9,9 60:5 64:6 74:23 75:5 113:4,15 114:10 132:6,8 133:8 142:17 151:20 152:7 154:7 178:5 <b>possession</b> 111:24 <b>possible</b> 23:15 155:6 177:4 186:22 <b>possibly</b> 91:22 130:16 191:14 <b>post</b> 28:5 62:11 137:9,14 143:15 146:17 146:21 154:8,9
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## [potential - privilege]

Page 39

<b>potential</b> 22:23 22:23 27:22 29:4 30:5 49:4 49:8 51:14 53:13 120:23 134:19 137:23 140:23,23 141:18,19 144:17 147:5 152:20 155:11 155:12,19 156:15 177:23 186:1 187:22	<b>predicates</b> 115:7 <b>prefer</b> 119:14 <b>preferences</b> 79:11 <b>prejudice</b> 63:18 158:14 163:16 181:20 <b>prejudicial</b> 181:10 <b>prelude</b> 70:13 <b>premature</b> 64:14 <b>preparation</b> 162:8 <b>prepare</b> 87:22 117:15 162:12 174:16 <b>prepared</b> 30:12 30:24 39:22,23 44:23 45:9 87:17 105:19 150:4 194:3 <b>preparing</b> 174:22 <b>presence</b> 117:2 <b>present</b> 4:19 19:2 29:1 181:21 <b>presented</b> 140:4 <b>presenter</b> 57:20 <b>presenters</b> 63:6	<b>preserves</b> 161:21 <b>preserving</b> 161:23 <b>pressing</b> 101:13 <b>prestia</b> 61:15 61:15 <b>presumably</b> 52:23 56:11 93:14 104:10 134:18 186:17 <b>pretrial</b> 8:11 <b>pretty</b> 8:22 19:11 49:7 108:13 187:11 <b>prevented</b> 123:17 <b>previous</b> 34:19 36:13 37:24 <b>previously</b> 113:13 <b>price</b> 101:6,11 101:14 102:4 102:17 104:5 104:24 105:3 <b>prices</b> 104:9 105:20,21,21 <b>primarily</b> 36:8 <b>primary</b> 156:12 <b>principles</b> 79:24 140:5 <b>prior</b> 25:19 60:20 61:20	77:9 83:11 118:24 123:3 123:13,19,24 124:12,16,18 124:21 129:8 129:12,24 147:3 155:3,16 170:21 193:5 <b>privilege</b> 21:4 21:16 22:7 30:9,17 35:8 38:4 39:7 40:13,17,20 46:1 68:21 69:8,13 70:6 71:7 76:18 78:12 82:1 84:19 86:10,13 86:18 87:7 89:17 90:2 93:23 94:10 96:23 98:16 100:12 108:17 110:9 111:1 115:9,19 119:23 120:12 121:19 123:10 124:8 129:1 131:10 135:15 136:1 140:17 145:4 146:12 147:23 148:20 149:2,4 152:17 152:23 153:1 157:3 158:20
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[privilege - prosecuting]

Page 40

159:3,13 161:1	56:4 69:20	145:15 151:8,9	141:10 150:8
161:7 162:21	107:5 163:18	157:7 159:6	150:15,22,24
163:24 164:19	<b>probe</b> 123:22	161:13,19	151:20,22,24
165:6,24	<b>problem</b> 6:6	166:21 167:22	152:2,5,6,7
167:14,16,19	9:18 58:2	169:3,9,10	<b>profit</b> 61:12
168:1,3,23	167:7 168:15	187:18	126:12 127:13
169:23 170:20	<b>proceed</b> 11:8	<b>producing</b>	<b>profitability</b>
171:3,24	183:20,20	179:18	137:11
173:14,18	186:12	<b>product</b> 29:20	<b>prohibiting</b>
<b>privileged</b> 11:4	<b>proceeded</b>	30:3,9,14	111:2
21:4 23:6,12	185:1	40:17 70:5	<b>prohibition</b>
35:13,24 46:3	<b>proceeding</b>	130:16 135:14	61:4
59:14,16 65:17	45:15 152:24	135:22 136:5	<b>project</b> 161:20
65:22 68:15,16	192:9 194:4	139:23 140:18	<b>prominently</b>
69:23 75:8	<b>proceedings</b>	141:9 147:8,22	16:15
82:4,5 83:7	167:4 193:3,5	148:1,20 149:5	<b>promoted</b> 38:8
84:6 85:24	193:6,9 194:6	149:10 153:12	49:20,21,22,23
88:16 91:23	<b>proceeds</b> 47:20	159:3 162:10	52:3,4
93:2,4,19	105:7	164:19 165:6	<b>proper</b> 97:13
100:13,20	<b>process</b> 165:3	166:18 170:10	98:16
101:15 102:2	173:21 189:16	171:24 172:12	<b>properly</b> 170:9
104:22 105:4,8	<b>produce</b> 25:24	173:14	<b>property</b> 135:1
106:4,10	46:10 57:8,17	<b>product's</b>	142:3 155:22
115:16,22	57:18 133:17	137:8	156:18
116:21 118:2	153:12 154:9	<b>production</b>	<b>proposal</b> 71:4
119:1,2 122:24	<b>produced</b>	25:21 57:15	<b>propose</b> 159:10
130:16 160:3	24:19 25:5,17	133:19 159:14	<b>proposed</b>
161:9 170:10	25:19 26:4	183:9	122:12 131:6
172:12 174:10	37:16 41:15	<b>productions</b>	180:3
174:11	45:22 46:7,14	57:16	<b>propriety</b> 45:8
<b>probably</b> 13:20	46:15 52:16	<b>products</b> 50:10	<b>prosecuted</b>
13:22 18:11	55:2 58:3,6,8	50:10,19,24	31:15 32:3
20:22 23:8	60:20 62:24	51:2 62:16	<b>prosecuting</b>
26:19 29:3	63:3 102:20	136:21,24	32:15
53:4,16,19	126:12 127:14	137:5,12	

**[prosecution - questioning]**

Page 41

<b>prosecution</b>	108:15 110:5	106:16 109:7	171:8
11:23 14:8	111:9 115:23	109:22 115:5	<b>puzzled</b> 21:11
31:7,11,13,19	133:2 148:3	160:10 162:5	<b>q</b>
31:21 32:4,7	150:4 158:23	<b>provision</b> 83:5	<b>q&amp;a</b> 140:7
32:11 33:21	160:6 173:13	88:20	<b>qualified</b> 26:11
34:14 36:21,22	175:11	<b>proxy</b> 50:12	193:7
37:1,7,19,21	<b>provided</b> 13:16	<b>pto</b> 35:21	<b>quarrel</b> 169:21
38:1,5,14,16	13:17 16:5	<b>public</b> 9:24	<b>quash</b> 8:20 9:5
39:6,9 61:15	26:6,14 37:18	10:3,5 193:19	28:19 34:19,21
61:17 63:14,15	47:15 49:14	<b>publicly</b> 103:1	35:2,6 67:22
63:20	56:7 69:24	<b>pull</b> 107:1	69:6 158:15
<b>prospective</b>	72:11 79:24	149:13	163:18,20
26:7	85:22 86:14	<b>pulled</b> 162:19	191:21
<b>prospects</b>	87:20 92:9,24	<b>purely</b> 89:14	<b>query</b> 44:21
147:10	93:9 95:22	108:16	<b>querying</b>
<b>protect</b> 89:16	98:20 101:16	<b>purported</b> 88:9	139:20
<b>protected</b>	103:13 104:7	<b>purportedly</b>	<b>question</b> 12:17
29:19 30:2,13	108:22 109:5	184:15	17:2 23:14
70:6 93:6	110:18,19	<b>purpose</b> 93:24	28:8 35:12
115:8 130:16	111:4 113:14	109:6 117:6	37:5 39:13
135:14 136:5	113:22 115:2	<b>purposes</b> 22:6	52:20 55:24
171:24 172:12	115:13 116:10	23:18 99:8	60:22 71:22
<b>protection</b> 30:9	116:17 128:13	106:15 109:22	81:20 82:10,13
147:8	130:11,24	127:7	83:23 84:7,12
<b>protective</b>	131:12 132:23	<b>pursue</b> 16:7	85:12 91:8
167:24	135:24 142:14	65:5 85:6	92:16 94:13
<b>protects</b> 82:1	142:16 145:5	<b>pursued</b> 155:2	96:12 101:24
<b>provide</b> 40:4	147:22 155:2	155:17	105:1,17
52:9 55:12	162:13 165:9	<b>pursuing</b> 63:16	156:13 157:15
67:1,13 70:7	183:15,16	<b>pushed</b> 133:14	157:17,22,23
73:14,19,20	187:16 189:18	176:13	159:10 175:15
74:11 78:22	191:17	<b>put</b> 9:21 31:19	182:13 189:15
83:16 86:7	<b>providing</b>	65:3 107:12	<b>question's</b> 88:7
90:1 94:14,20	83:10 88:21	117:16 123:14	<b>questioning</b>
95:20,23 107:3	92:21 93:24	143:7 167:20	79:15 85:2

[questioning - reasons]

Page 42

120:18 121:12 130:23 135:16 144:7 180:2 <b>questions</b> 10:9 12:16 14:14 27:16,17 31:3 40:1 42:1,10 50:15 76:15 78:18 79:6,13 80:15 83:21 86:4 87:8 88:2 96:21 98:2 100:13,17,18 101:6 103:14 104:2 108:11 108:13,19 111:9,12,21 112:7 113:3,7 113:8 114:24 116:13 118:16 119:17 120:1 120:10,15 121:18,23 122:11,14 123:8 127:17 129:1 131:5,17 139:3 140:6,8 140:21,24 142:1,2,7,11 143:24 144:6 145:21 148:12 155:10,20 157:1 158:1 190:3	<b>quick</b> 46:18 67:9 <b>quickly</b> 51:10 67:8,16,18 144:12 154:3 <b>quite</b> 21:1 36:7 48:8 151:3 182:10  <b>r</b>  <b>r</b> 2:1 3:1 4:1 6:1 <b>rachel</b> 4:4 8:3 165:18 175:7 <b>rachel.cohen</b> 4:12 <b>radtke</b> 194:2 194:15 <b>raised</b> 47:11 62:14 81:11 115:11 158:3 163:23 164:9 169:13 170:22 171:10 172:6 174:17,18 <b>raising</b> 50:12 173:9 <b>ramy</b> 2:13 7:13 <b>range</b> 73:21 77:17 88:5 <b>rate</b> 77:7 78:22 <b>rather</b> 82:3 128:24 133:6 183:15 187:2 <b>rationale</b> 166:6 <b>ratner</b> 61:14,15	<b>ratnerprestia</b> 34:21,22 35:6 <b>reached</b> 133:6 178:18 179:12 <b>reactions</b> 43:23 <b>read</b> 85:14 91:21 102:4 107:2 <b>reading</b> 69:20 91:12 <b>ready</b> 45:19,22 101:19,22 186:5,10,12 <b>real</b> 58:2 189:15 <b>reality</b> 171:23 177:17 186:21 <b>realize</b> 150:3 <b>really</b> 15:1 20:2 31:7,14 33:13 34:2 46:14 60:8 64:8 65:4 65:20 66:12 68:16 75:11 84:8 91:15 97:13 100:2,14 101:7 103:16 113:3,12 143:20 158:8 161:15 162:23 163:11 167:1 167:10 168:1 174:1 178:7 185:9 190:13 191:13	<b>realm</b> 108:16 155:16 <b>reason</b> 28:6 40:24 74:15 85:4 98:5 114:9 145:13 146:3,6 147:21 153:6 154:11 160:2 161:8,12 162:21 163:20 166:10 167:23 173:23 182:15 190:7 <b>reasonable</b> 49:1 50:2 63:19 71:20 73:21 74:3 76:24 77:16 78:7 121:22 124:3 138:11 141:16,21 153:8,18 160:14 165:16 177:12 <b>reasonably</b> 29:12 36:2 87:17 177:21 <b>reasoning</b> 48:2 100:8 <b>reasons</b> 62:6 113:1,10 121:15 156:3 166:6 170:8 189:2
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## [rebuttal - regarding]

Page 43

<b>rebuttal</b> 32:19 58:17 59:20 60:2 95:2 121:12 188:16 <b>recall</b> 28:10,15 31:24 32:10 62:6 63:3 90:10 96:19 102:2 105:13 109:23 <b>recalled</b> 85:24 <b>receive</b> 128:6 188:3 <b>received</b> 13:4 78:4 89:15 103:10 106:18 140:6 142:12 165:23 178:8 188:2 <b>receiving</b> 52:19 <b>recent</b> 37:6 150:23 168:20 <b>recipients</b> 132:4 <b>recognize</b> 182:22 <b>recognized</b> 182:24 184:24 185:15 <b>recognizes</b> 30:20 <b>recollection</b> 63:5 <b>recollections</b> 52:18	<b>recommending</b> 21:17 22:3 <b>record</b> 6:2,15 6:16 7:6 13:22 14:3,11 15:16 15:23 18:24 23:15 26:20,22 31:8 32:7 35:3 37:11 39:11 40:3 43:15,19 45:3,5 46:8,14 47:15 48:16 49:7,9 52:3,15 55:5,19 56:5 56:15,17 63:4 63:23 64:3 65:8 66:22 67:3 87:13 88:17,24 92:5 102:15 106:23 107:6,12 108:21 109:11 114:2,6 115:18 116:2 117:24 127:9,19 128:11,17 129:2,18 130:2 130:21 132:12 133:5 141:17 143:7 144:14 159:2 160:7 165:5 170:16 174:9 175:23 180:14 182:11 185:13 192:1,6	193:9 194:5 <b>recorded</b> 193:6 <b>recording</b> 193:8 194:4 <b>records</b> 39:24 55:11 57:3 114:3 <b>recouped</b> 138:8 <b>recovered</b> 144:16 147:10 <b>red</b> 6:8 <b>redirect</b> 91:17 108:7 109:3,14 115:3 <b>redlines</b> 167:20 <b>reduced</b> 193:7 <b>refer</b> 31:11 <b>reference</b> 108:23 <b>referenced</b> 81:14 <b>referencing</b> 140:14 <b>refers</b> 15:22 91:2 <b>reflective</b> 168:21 <b>reflects</b> 180:14 <b>refuse</b> 181:3 <b>refused</b> 55:12 58:24 73:16 86:7 101:5,13 154:9 178:22 <b>refuted</b> 63:10	<b>regard</b> 24:22 50:13 51:14 56:3,16 69:13 72:15 80:11 82:21 85:1 86:2 87:13 95:18 99:12 101:1 105:23 112:15 114:5 114:11,22,24 117:22 120:19 122:7,18 128:19 130:4,5 131:2 136:11 142:2 144:9 146:15 148:21 150:18 151:16 154:18 155:7 155:16 157:3 157:11,23 158:4,7,13,18 158:19 159:4 163:15,24 164:1,20 171:3 171:19 175:14 191:4 <b>regarding</b> 33:22 56:6,18 69:5 71:4,19 72:19 73:19 74:10,12 79:13 83:11 86:15,23 87:5 89:23 90:5 92:19 96:8 108:15,19
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[regarding - relying]

Page 44

109:7 111:2,21 111:24 112:10 119:18,22 120:1 137:5 148:12 151:22 155:13,18 159:18 171:2 175:24 176:1 <b>regardless</b> 96:24 97:13 111:3,5 <b>regards</b> 72:17 <b>regular</b> 146:4 <b>reiterate</b> 65:10 <b>relate</b> 9:6 15:3 33:14 40:22 106:5 112:18 117:21 122:2 144:3 146:24 154:24 157:7 158:9 <b>related</b> 6:17,22 11:21 16:1 22:1 25:3 26:13 27:1,16 28:18 29:9,10 33:21 37:1 38:16 47:3 68:20 79:22,24 100:19 114:12 115:4 122:3,16 124:13 125:10 134:10,15 135:5 148:15 158:13,20	159:22 181:13 193:11 194:7 <b>relatedly</b> 157:2 <b>relates</b> 23:9 30:23 40:24 48:1 55:24 66:18 69:6 88:21 112:15 116:4 121:7 131:5 135:2 167:15 168:8 170:2 183:4,6 184:11 <b>relating</b> 11:20 11:23 21:23 23:1 27:17 32:4 56:1 74:17 86:4 121:23 122:12 122:15 129:17 130:8,13 131:6 131:16 140:21 154:24 169:22 171:9 172:21 <b>relations</b> 12:10 <b>relationship</b> 167:13 <b>relative</b> 94:4 193:13 194:10 <b>relatively</b> 20:20 67:16,18 173:1 <b>relaunches</b> 152:5 <b>release</b> 179:19	<b>released</b> 179:16 <b>relevance</b> 28:3 39:15 48:23 62:7 66:23 123:7 124:5 131:11 133:13 134:17 135:5 135:20 136:2 136:18 139:4 147:18 148:1 150:1 153:3,4 157:17 158:12 158:17 184:10 185:20 <b>relevant</b> 11:3 12:4 14:17 16:6,19 25:5 26:23 35:10 36:2,7,14,21,21 36:22 37:3 38:11 42:20 44:17 48:12,19 49:4 50:1,16 51:8,22 55:9 55:17 57:9 58:20 63:10,17 63:22 66:8 68:21 70:7 99:4 103:24 105:15 118:14 119:4,15 121:16 123:1,2 125:5 127:3 129:13 130:7,9 130:17 132:9	133:9,17,20 134:19,22 135:3,8,13 137:3,9,16,17 138:13 139:1,2 143:13,16 145:10 146:9 146:13 148:17 148:19 149:5,9 149:11,18,24 150:9 154:8,12 156:2,20,22 157:16 173:22 181:13 182:8 183:6,6 190:13 190:16 191:8 <b>reliability</b> 36:1 <b>relied</b> 19:3 79:3 79:10 80:8 107:22 118:24 126:15 145:9 184:14 <b>relief</b> 107:7 158:2 <b>relies</b> 79:23 <b>rely</b> 17:21 61:9 87:4 98:10 99:5 100:7 114:17 <b>relying</b> 80:4 92:17 98:21 99:2 120:2 127:2,6,8 141:7
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**[remain - responding]**

Page 45

<b>remain</b> 36:5	107:8,16,22	<b>representatives</b>	<b>resolution</b>
<b>remainder</b>	113:21 116:5	22:20 28:24	163:19
159:7 174:13	121:4 126:16	66:14	<b>resolve</b> 6:22
180:4	165:14 171:6	<b>represented</b>	67:8 69:12
<b>remained</b> 31:22	173:4,19,23	46:7 49:17	95:8 108:3
41:7 176:18	<b>report's</b> 79:23	96:16 181:1	158:15 160:12
<b>remaining</b>	<b>reported</b> 1:19	<b>representing</b>	164:17,19
66:22 158:7	<b>reporter</b> 6:2,12	49:16 53:20	170:23 173:2
160:24 163:14	6:12 192:6	95:13 166:12	173:17,17
178:21 179:2	<b>reporting</b> 63:6	<b>represents</b>	174:10,12
186:23	<b>reports</b> 87:13	35:15 168:19	191:16
<b>remarks</b> 41:18	89:19 95:21,22	<b>request</b> 9:23	<b>resolved</b>
44:1	98:7 106:24	21:19 64:2	121:10 171:3
<b>remember</b> 88:1	181:15 184:13	68:18 71:2	191:19
<b>remind</b> 118:8	<b>represent</b>	74:9 113:1	<b>resolving</b> 26:20
<b>removed</b> 40:19	51:12 53:13	114:9,20 116:3	<b>resources</b> 20:2
<b>renew</b> 158:14	61:6,17 147:3	117:6 121:14	<b>respect</b> 21:20
163:16	165:20 173:8	130:4 131:2	22:12 24:21
<b>reopen</b> 117:5	180:22	155:8 157:10	26:8 34:19
<b>repaid</b> 48:17	<b>representation</b>	163:16	37:19 38:5,7
62:1	35:13 58:8	<b>requested</b>	44:8 110:13
<b>repeated</b>	85:7 183:23	46:12 52:15	132:13,16
178:23 179:20	<b>representations</b>	73:13 186:19	144:17 180:21
<b>repeatedly</b>	44:12,15 45:7	<b>requests</b> 33:10	<b>respectfully</b>
183:8	46:13 51:6	35:12 133:23	106:9
<b>reply</b> 110:15,21	56:22 57:11	158:13	<b>respects</b> 189:12
118:5 159:12	58:2 114:15	<b>require</b> 65:8	<b>respond</b> 36:15
169:17 170:1	129:14	130:23	142:6 147:12
172:15	<b>representative</b>	<b>required</b> 13:15	152:11 172:15
<b>report</b> 36:9	27:3 99:6,7	73:15	189:24
78:5,20,21	164:21 168:10	<b>requires</b> 54:8	<b>responded</b>
80:7 86:21	171:8,18	<b>requiring</b> 83:5	52:11,12 190:3
89:4 90:20	173:10 186:16	106:19	<b>responding</b>
92:10,17,18	<b>representativ...</b>	<b>research</b>	148:11
94:14 98:12	164:17	150:24	

[response - rizzi's]

Page 46

<b>response</b> 14:22 21:7 29:18 39:13 44:20 47:6 52:21 54:7 55:8 58:22 73:19 75:4,12 76:7 76:22 77:5,15 78:16 79:1 98:24 101:3 102:1,2 104:22 106:7,8 126:5 126:7 128:20 180:11 185:9 190:5	<b>resume</b> 49:22 <b>retained</b> 61:16 <b>return</b> 47:19 52:5 62:2 153:16 <b>revealing</b> 105:4 <b>revenue</b> 50:20 51:1 62:17 72:21 76:15 80:16 119:7,13 129:12,24 136:23 137:1 150:22 153:11 153:13 181:13 <b>review</b> 35:11 70:8 71:2,4 150:3 157:3 159:4,15,19 160:17 164:7 167:2 168:17 171:9,16 173:16	68:2 70:13 71:18 72:3 73:5 75:1 80:23,24 82:11 84:1 89:21 96:4 98:1 103:4 104:2,4 108:2 110:14 110:21 112:2 113:5 117:8 122:17 125:1,6 126:23 129:20 130:3 134:9,20 138:15 140:9 141:13 143:19 149:5,7 151:15 160:22 166:15 174:15 175:9 176:12,14 181:5 188:13 188:20,21 191:11	29:17 30:6,10 30:18 31:6 32:12,14 33:8 33:17 34:12 37:2,17 38:3 39:13 40:10 41:1,7,18 42:24 43:9 44:8,12 45:17 46:7 47:1,8,13 47:21,23 49:14 49:15 52:8,22 52:23,24 53:8 54:11 55:19,22 56:12 57:19 58:17,20,24 59:19 60:1 62:15,20 64:12 64:15 65:1 66:21,24 67:24 69:5 99:22 100:5 117:11 132:5 139:14 140:3 144:11 144:22 146:1 146:14,19 147:2,17,24 153:14 154:1,4 158:13 182:14 188:17,18
<b>responses</b> 73:8 181:12 183:9 <b>responsible</b> 36:8 <b>responsive</b> 25:4 25:21 147:19 169:15 <b>rest</b> 117:20 191:19 <b>restriction</b> 61:4 61:12 63:1 147:9 <b>restrictions</b> 60:14 <b>restrictive</b> 65:11 <b>resubmit</b> 78:24 <b>resulted</b> 146:20 <b>results</b> 102:14 140:14	<b>reviewed</b> 21:14 <b>reviewing</b> 122:15 <b>rgolden</b> 2:9 <b>rhanna</b> 2:21 <b>richards</b> 3:5 4:23 7:23 <b>right</b> 6:10 7:4 9:2,4 10:6 19:18 25:10 32:17 33:6 43:16 44:24 53:8,12 65:23	<b>rigorous</b> 66:3 <b>rise</b> 96:2 <b>rising</b> 65:15 <b>rizzi</b> 2:12 6:19 7:13,16 9:12 9:13 10:8 11:7 12:3,6 13:9 14:1,6,19 15:19 19:7,18 20:17 21:10 22:10 24:13,17 25:7 27:5,10 27:12 28:1	<b>rizzi's</b> 11:17 33:21 34:7 36:7 38:19 39:8,15 41:5 46:20 48:7

[rizzi's - rule]

Page 47

49:20 55:16	73:13,16,18	134:13 137:3	<b>role</b> 12:12,12
94:7 122:15	74:1 76:8,16	142:19 148:13	17:3,6 19:20
158:9 163:15	79:4,9,19	148:15 150:22	19:23 20:3,9
<b>rlf.com</b> 3:9,10	80:17 82:6,13	151:20 153:2	24:22 26:8,16
<b>robertiello</b>	83:11,23,24	162:5,14	27:13 36:7
28:14 144:2	84:14 85:3,9	166:13 170:14	39:8 44:2,2,9
185:18,23	85:13 86:7,12	176:6 177:10	48:8 49:22,24
187:10,17	86:16 88:9,9	177:23 178:1	55:20 59:12
<b>robinson</b> 74:19	89:16 90:4,6	178:18,23	62:22 115:20
113:8	90:11,14,16,22	179:4,11,12	158:13
<b>robinson's</b>	91:19,20 92:3	180:19 181:2	<b>roles</b> 44:16
75:17	92:12,12,22	181:21 182:14	54:15
<b>robocast</b> 1:4	93:13,17 94:2	185:2	<b>roman</b> 71:6,6,7
2:2 6:23 13:18	94:4,15 95:14	<b>robocast's</b> 15:3	71:7,8
14:7,8,20 15:9	97:7 101:16,24	23:21 29:14	<b>ronald</b> 2:4 7:11
15:22,23 19:1	102:9,16,21	71:20 76:12,14	<b>room</b> 57:18
20:16 22:20	103:22 104:23	78:4 79:3 80:7	<b>rough</b> 33:20
23:1,16,17,18	105:2,11,12,15	81:23 83:15	<b>roughly</b> 112:18
24:1 25:7,17	105:16 106:17	87:4 89:22	<b>round</b> 144:4
26:3,9 27:3,8	109:21,24	91:2 92:2	<b>rudinely</b> 27:20
28:13,23,24	110:12,24	94:19 95:1,3	<b>royalty</b> 71:20
29:7 31:12	111:10,11,16	98:16 102:23	73:21 74:4,12
32:8 33:23	111:17,23	109:13 110:4,9	77:1,7,17,19
34:9 37:16	113:13 116:8	114:10 116:17	78:1,7,22 79:9
40:4,7,8 41:2,6	118:6 119:2,5	116:24 119:10	79:12,12 96:19
41:13 43:1,2	119:12,23	119:21 126:9	98:9 99:8
46:1 47:9,11	120:23 123:3,4	134:24 135:16	119:10,11,14
49:7,17 50:15	123:10,17,18	136:21 137:11	119:16,18,22
50:16 52:1,21	123:20,22	159:13 176:24	124:3
53:6 56:13	124:12,15	179:20 181:10	<b>rule</b> 45:3 54:9
57:3,8,16	125:18 128:5	<b>robust</b> 46:8	73:12,15 74:10
58:10 60:5	128:21 129:7	49:7	76:14,22
61:7,16 62:10	129:24 133:4,9	<b>rodney</b> 3:6	135:21 140:21
62:16 64:10	133:14,16,17	<b>rog</b> 77:14 78:16	153:5,6 167:7
71:1 72:20	133:23 134:1	79:14 183:8	

## [ruling - seems]

Page 48

<b>ruling</b> 159:17 <b>run</b> 18:4 19:8 <b>running</b> 46:17 79:11 119:11 119:14 <b>runway</b> 184:4  <b>s</b>  <b>s</b> 2:1 3:1 4:1 5:1 6:1 <b>sale</b> 51:1 <b>sales</b> 137:14 <b>samantha</b> 4:20 <b>sample</b> 164:21 <b>samsung</b> 148:5 <b>sand</b> 65:4 182:5 <b>sara</b> 3:4 7:24 <b>sat</b> 186:12 <b>saved</b> 131:24 <b>saw</b> 57:6 <b>saying</b> 27:11 49:12 53:4,5 54:21 59:9 67:10 74:17 75:23 78:17,19 79:23 82:15 85:15 88:18,23 90:10,19 91:12 91:21 92:5,14 94:13 102:5,10 102:13 103:9 103:21 104:4 105:9 109:11 123:2,12 124:12 125:13	127:9,17 129:16,18 132:24 137:21 162:18,19,22 164:2,4 170:16 170:17 176:10 188:7 <b>says</b> 6:4 10:22 49:9 81:18 84:5 85:19 87:24 88:3,4 88:10,12,13 91:15 93:11,15 94:16 99:14 105:5 106:1 109:4 116:6 121:15 129:16 131:11 180:3 <b>sbrauerman</b> 2:8 <b>scenario</b> 17:17 18:13,22 20:9 157:18 <b>scenarios</b> 17:8 <b>schaszberger</b> 4:6 8:4,7 70:24 71:3 <b>schedule</b> 178:18,19 179:7,21 180:20 181:4 182:18 186:18 <b>schedule's</b> 176:12	<b>scheduled</b> 45:15 178:2 179:10 <b>scheduling</b> 179:1,5 191:2 <b>scope</b> 25:12 28:7 40:6 60:11 133:7 146:10 155:4,6 157:22 158:1 <b>screen</b> 6:5 9:21 <b>second</b> 10:13 11:17 25:20 58:24 68:12 69:11 71:9,10 71:13 72:7 81:11 89:18 96:3 99:13 101:18 114:11 117:10 120:21 147:14 168:9 190:15 <b>section</b> 98:7 <b>secure</b> 129:10 148:16 <b>see</b> 6:5 13:2 33:3 38:12 39:20,24 40:16 41:7 42:3 56:11 57:6 64:4 68:6 70:19 78:14 86:17 90:7 101:8 106:19 117:19 118:18	134:12 148:19 158:16 159:16 165:13 185:17 188:19 191:14 <b>seeing</b> 6:6 33:19 96:19 <b>seek</b> 16:17 20:3 41:6,19 58:23 61:1 72:8,18 81:13 112:20 114:12 184:20 <b>seeking</b> 10:22 18:12 33:13 40:9 59:9,15 60:15 69:2 72:20 73:5,9 73:21 76:9 79:18 80:11 81:23 82:3 86:4 91:24 116:14 124:1 153:6 <b>seeks</b> 165:5 <b>seem</b> 12:11 156:19 164:10 165:16 <b>seemed</b> 11:24 48:21 85:15 122:14 <b>seems</b> 11:14 18:10 42:19,19 43:6,12 69:14 72:7 79:21 81:1 82:12 83:21 85:9
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[seems - side]

Page 49

88:7 91:22 97:10 103:19 115:21 120:10 121:9,15 122:7 122:11 131:5 143:11 158:9 160:13 162:21 163:17 <b>seen</b> 27:1 64:1 107:8 108:24 109:1 114:4 129:22 139:15 168:11 <b>selves</b> 187:7 <b>send</b> 75:3 81:1 81:17,24 82:7 82:14,17 83:23 84:8,15 85:5 99:16 167:20 <b>sending</b> 53:21 100:9 <b>sense</b> 9:7 22:16 22:18 47:5 102:23 125:15 133:5 <b>sensitive</b> 22:13 <b>sent</b> 60:19 83:11 142:12 172:11 <b>separatable</b> 165:1 <b>separate</b> 28:19 37:21 38:20 53:18 113:20 134:10 146:4	158:22 166:24 <b>separately</b> 24:14,15 40:22 107:3 <b>september</b> 187:15 <b>series</b> 57:23 <b>serious</b> 31:14 <b>seriously</b> 181:10 188:9 <b>serve</b> 112:14 182:16 <b>served</b> 18:7 73:12 182:19 <b>serves</b> 185:22 <b>service</b> 6:13 132:2 <b>services</b> 20:13 21:22,23 62:17 <b>set</b> 8:10 43:24 55:18 76:8 78:6 112:7 114:19 156:3 160:16 164:16 168:9 <b>setting</b> 119:6 <b>settled</b> 124:24 <b>settlement</b> 123:13 125:4 125:16 128:19 129:8 130:9 <b>settlements</b> 125:9 126:11 126:22 127:3 127:23 128:4	129:18 130:18 <b>seven</b> 97:2,16 165:14 <b>shape</b> 27:20 <b>share</b> 21:15 29:7 86:7,8 88:9 89:11,14 89:17 91:6,19 92:2,11,19 93:8,13,17,18 94:2,7,15,21 101:1,6,12,14 101:21 102:1,4 102:9 103:17 103:23 104:5,9 104:21,24 105:3,8,13,16 105:20 108:11 108:15,19 110:11 111:3 111:11,17,23 111:24 116:9 116:17 <b>shared</b> 23:7 30:5 89:2 92:11 101:20 103:1 106:17 <b>shares</b> 88:3 90:22 102:17 103:10 117:1 <b>sharing</b> 22:12 30:7 <b>she'll</b> 182:5 <b>shed</b> 163:19	<b>sheds</b> 151:22 <b>sheet</b> 143:23 145:22 146:2 <b>shelton</b> 10:15 65:11,12 66:7 <b>shield</b> 46:2 84:20 87:4 119:24 169:3 <b>short</b> 117:16 153:23 178:20 184:4 <b>shot</b> 43:11 96:14 <b>should've</b> 52:14 135:24 168:1,5,15 185:9 190:20 190:23,24 <b>show</b> 27:2 39:11,12 43:7 44:24 45:10,20 46:1,14 104:15 110:9 123:5 142:10 166:23 <b>showed</b> 81:5 89:3 <b>showing</b> 40:4 44:9 104:5 128:9 130:6 168:5 185:14 <b>shown</b> 111:1 <b>shows</b> 21:2 52:3 <b>side</b> 6:11 7:5,7 7:20 10:7,10
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[side - sought]

Page 50

10:12 14:18	<b>situation</b> 77:2	102:5,13,17	151:3 153:10
15:17 21:2	87:4 119:23	103:9,19,24	<b>solution</b> 167:7
24:1 25:6,15	129:11	104:8,23	<b>solutions</b> 167:6
31:5 42:17,21	<b>six</b> 77:9 165:23	105:14 107:19	<b>somebody</b>
46:22 64:16	186:23	108:6 109:15	74:22 89:3
66:17 70:14	<b>size</b> 188:12	109:16 111:12	94:17 145:23
85:19 99:14	<b>skills</b> 193:10	111:21 113:23	<b>somewhat</b> 24:1
106:1 127:1,2	194:6	115:1 116:7	44:4 176:19
130:11 132:22	<b>slightly</b> 34:6	119:18,21	<b>soon</b> 169:7
143:19 145:21	79:22	120:2,3 145:1	173:2
157:24 163:7	<b>small</b> 16:10	145:3 159:13	<b>sooner</b> 182:16
175:1,6 180:3	17:18 19:7	159:22 160:16	<b>sorry</b> 26:18
181:7,24	20:8,20 21:1	161:16 162:1	36:15 53:1
183:12 185:4	44:3	162:11,12,21	54:20 72:24
<b>side's</b> 23:10	<b>smith</b> 2:16 7:12	163:2 166:11	76:12 77:4,22
118:16	19:10 20:7	169:22 170:3	81:6,6 83:19
<b>sides</b> 11:11	47:16,22 52:7	170:13 172:10	91:7 104:17,17
12:22,24 42:8	60:23 74:22	<b>smith's</b> 80:3,10	118:5 132:20
155:2 184:12	76:13 79:4,11	81:16 83:22	145:16 154:17
<b>signature</b>	80:1,6,15,20,21	84:13 85:11	162:17 165:19
193:17 194:14	81:5 82:3,6,12	86:22 87:19	180:17 182:6
<b>significant</b>	83:10 84:4	89:8 91:14	<b>sort</b> 12:12 26:1
41:24 48:6	85:15,23 86:7	101:9 107:17	27:20 36:13
<b>similarly</b> 63:14	86:24 87:1,5,8	108:10 109:14	40:14 54:13
<b>simple</b> 178:7	89:2,9,24	109:17 116:15	136:24 161:19
<b>simply</b> 46:6	90:10,16,24	117:14 128:23	176:4
58:7 63:6	91:3,4,15 92:1	159:24 160:18	<b>sorts</b> 142:10
82:23 106:6	92:5,13 93:1,7	161:5 166:21	<b>sought</b> 13:21
114:2 120:23	93:11,16,18	169:13	14:19 20:13
173:21 181:2,3	94:17,21 95:13	<b>sofer</b> 31:13	26:13 33:17
<b>single</b> 20:1	96:1,10,10,14	32:3 37:2	35:14 41:21
107:1 169:24	97:2 98:6,11	179:6 180:23	42:1 52:10,11
170:2	98:15,21 99:10	<b>sole</b> 156:12	55:7 59:2
<b>sitting</b> 28:15	100:13,15	<b>solely</b> 98:21	66:11,13,13,19
	101:5,10,17,19	106:14 117:2	72:1 74:8,9

[sought - submit]

Page 51

76:11,17 77:16 79:5 80:19 83:12 93:7 94:21 113:17 130:22 134:5 135:19 154:22 159:14 178:19 <b>sound</b> 21:6 <b>sounded</b> 38:18 <b>sounds</b> 19:18 23:3 36:24 77:24 82:14 88:19 102:10 145:23 164:24 191:5 <b>southern</b> 41:4 <b>space</b> 110:16 169:16 <b>spalding</b> 20:7 <b>span</b> 137:4 <b>speak</b> 29:14 36:23 48:13 127:23 165:20 <b>speakers</b> 192:4 <b>speaking</b> 9:9 32:21 95:10 <b>speaks</b> 16:20 118:15,17 120:14 <b>specific</b> 88:6 102:3 129:22 145:14 <b>specifically</b> 21:22 26:10 71:23 129:23	153:3 <b>speculation</b> 150:2 <b>sphere</b> 157:17 <b>split</b> 149:23 <b>spoke</b> 139:14 <b>square</b> 3:6 <b>srizzi</b> 2:20 <b>stage</b> 168:6 <b>staging</b> 41:5 <b>stand</b> 65:1 <b>standard</b> 154:7 <b>stark</b> 51:7 <b>start</b> 7:6 33:7 111:15 <b>started</b> 44:13 85:11 <b>starting</b> 104:20 <b>starts</b> 148:12 <b>state</b> 152:6 154:19 <b>stated</b> 84:12 110:11 <b>statement</b> 90:23 108:9 <b>statements</b> 59:20 126:12 127:14 129:23 <b>states</b> 1:1 <b>status</b> 173:4 <b>stay</b> 157:20 <b>staying</b> 81:10 <b>stent</b> 36:5 <b>stephen</b> 2:3	<b>stepping</b> 12:17 <b>steps</b> 22:11 <b>steve</b> 7:10 <b>steven</b> 2:12 7:13 9:13 188:17 <b>stipulated</b> 182:24 <b>stock</b> 91:19 106:15 <b>stood</b> 41:8 <b>stop</b> 24:23 126:18 <b>story</b> 182:10 <b>strategic</b> 185:3 <b>strategy</b> 19:21 37:19 65:19 94:6 119:5 <b>street</b> 1:17 2:6 3:7 4:9 142:20 <b>strength</b> 29:16 138:5 <b>strengths</b> 135:10 <b>stretch</b> 20:1 <b>strike</b> 66:5 130:12 <b>strikes</b> 42:12 42:16 <b>strong</b> 25:22 29:4 <b>stronger</b> 45:12 <b>struck</b> 69:19 <b>structure</b> 79:9 96:18 119:10	119:16,18,22 <b>struggling</b> 48:5 153:12 <b>stuff</b> 21:6 24:9 60:14 98:8 122:1 149:3 170:2 <b>stuff's</b> 107:6 <b>sub</b> 72:3,13 81:11 84:4 112:20 <b>subcategories</b> 71:8 165:9 <b>subcategory</b> 163:22 <b>subject</b> 15:15 36:2 43:1 70:6 82:9 85:2 102:11 106:4 122:2,24 133:22 142:1 147:7 153:7 155:10 156:19 157:8 158:7,10 190:9 <b>submission</b> 39:17 66:4 171:15 173:10 173:22 174:6 <b>submit</b> 16:18 44:6 45:4,9,23 63:24 64:5,17 70:2 117:12 146:3 150:1 151:5 162:1
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[submit - suspect]

Page 52

185:8 <b>submitted</b> 37:14 44:7,22 44:24 79:23 163:12 166:22 184:13 <b>subpoena</b> 12:8 13:12 35:16 40:6 41:5,9 45:17 51:23 57:3,4 59:2,4 61:18 65:6 <b>subpoena's</b> 60:6 <b>subpoenaed</b> 34:22 35:6 42:2 61:5 136:8 177:2 <b>subpoenas</b> 10:22 33:11 51:15 64:17 66:7 <b>subsequent</b> 90:19 162:5 <b>subsequently</b> 78:20 170:12 <b>subset</b> 149:10 164:15 <b>subsets</b> 68:11 <b>substance</b> 80:3 83:2,6 112:14 115:20 116:13 122:2 130:6 <b>substantively</b> 61:11 137:6	<b>success</b> 23:24 24:12 48:14 49:12 50:5,7 50:11,11,12 62:9,10,14 123:5 135:9 136:12,15,18 137:4,9,11,13 137:13,16,20 138:19 139:7 139:15,24 140:5,13 141:9 143:12 153:10 <b>successes</b> 139:23 <b>successful</b> 48:4 48:22 50:18 139:21 140:11 <b>sue</b> 53:14 82:23 83:13 <b>sufficient</b> 113:14 115:18 160:7 <b>sufficiently</b> 116:1 <b>suggest</b> 115:20 156:6 <b>suggested</b> 113:11 115:12 116:15 <b>suggesting</b> 18:21 69:14 78:14 82:12,24 120:12	<b>suggestion</b> 57:5 76:2 113:20 158:21 <b>suggests</b> 32:8 113:22 <b>suit</b> 11:23 29:5 124:13,16 138:8 141:1,24 <b>suite</b> 2:6 3:7 4:9 <b>summarize</b> 90:8 <b>summarized</b> 72:16 <b>summarizes</b> 107:16 <b>summer</b> 4:23 8:1 <b>super</b> 71:17 <b>supplant</b> 118:23 129:3 <b>supplement</b> 39:22 43:20 64:2 67:2,14 73:14 75:21 86:12,18 <b>supplemental</b> 45:3 57:5 77:14 78:24 87:7 98:19 117:17 <b>supplementat...</b> 14:2 67:9 113:18	<b>supplemented</b> 63:22 73:18 <b>supplementing</b> 65:8 <b>supplements</b> 39:23 45:10 <b>support</b> 34:24 44:8,24 50:12 64:6 90:23 98:9 173:14 <b>supported</b> 40:18 <b>supports</b> 111:2 135:22 <b>suppose</b> 131:14 <b>supposed</b> 48:18 66:6 160:15 175:18 <b>sure</b> 21:10 24:16 36:19 39:3 42:7 48:15 53:2 83:20 90:3 91:9 100:21 101:4 104:16 106:22 107:10 107:14 112:4 126:19,20 132:21 137:20 139:10 143:9 176:7 178:6 187:21 191:7 <b>surprise</b> 61:17 <b>suspect</b> 158:17
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[suspenders - testified]

Page 53

<b>suspenders</b> 187:21 <b>sword</b> 84:19 87:3 119:24 <b>sworn</b> 48:6 193:5 <b>systemically</b> 46:2	68:7,22 74:19 74:24 96:10 101:19 102:11 122:20 131:4 <b>talked</b> 38:17 50:19,19 75:15 103:16 104:1 163:6	126:2,4,7,20,24 127:5,13,20 128:3,13 129:5 129:16 141:15 142:6 143:5,9 144:12,23 145:2,16,19 148:2,4,7,9,22 149:7,22 150:21 152:5 161:3,4,14 163:1,9 164:2 164:4 168:13 168:17 169:12 170:4	<b>teleglobe</b> 93:21 <b>tell</b> 11:9,12 12:20 14:13 18:23 56:15 70:11 72:2 82:12,15 84:15 85:4 90:15 101:11 104:8 104:22 105:13 109:10 111:6 140:16 143:7 158:5 160:5 173:21 178:5 187:2
<b>t</b>	<b>talking</b> 12:5 21:4 22:7 30:16 38:19 43:8 53:15 70:12 71:23 83:20 84:8 87:12,23 89:1 109:5 111:15 124:11 129:19 131:12 134:21 137:21 138:7 139:6 144:19 147:20 184:7	<b>tara</b> 4:3 8:3 32:24 <b>tara.elliott</b> 4:11 <b>target</b> 166:5 <b>targeted</b> 133:23 <b>targets</b> 53:14 60:17 <b>team</b> 18:16 49:18,19 57:21 188:12 <b>tease</b> 76:24 <b>technology</b> 9:18 <b>techs</b> 152:15 <b>tee</b> 172:5 173:5 <b>teed</b> 145:21 171:12 <b>teleconference</b> 112:13	<b>telling</b> 16:18 49:7 77:6 <b>temporal</b> 155:4 <b>ten</b> 53:13 85:14 <b>term</b> 53:11 143:23 145:22 146:2 164:18 <b>terms</b> 10:17 16:21 19:22 29:15,16 34:2 61:2,14,19 62:9,13,22 63:12 65:16 92:16 97:18 100:8 122:17 144:23,24 <b>test</b> 44:14 65:11,12 66:7 66:8,8 80:2 <b>testified</b> 91:3 101:17 102:17
<b>t</b> 5:1 <b>tables</b> 15:21,22 102:20 104:6 <b>take</b> 10:23 26:22 41:8 43:8 60:8 67:18 83:24 94:24 95:16 111:14,18 139:12 169:9 183:2 184:16 184:19 185:3 188:4 189:1,14 189:22 190:1 190:12 192:2 <b>taken</b> 12:21 13:2 15:8,14 22:11 37:13 44:21 66:23 123:22 147:4 151:20 152:7 185:5 190:21 190:24 193:3 193:12 194:9 <b>talk</b> 11:11 31:1 31:7 50:9 56:2	<b>talks</b> 68:10,15 126:22 <b>talmage</b> 2:15 7:14,16 95:12 95:13,15 96:7 96:15 97:17 98:14 99:21 100:11,23,24 101:4 102:12 103:6 104:3,12 104:16 105:18 106:8,20,22 107:5,10,14 108:9 120:9,20		

[testified - third]

Page 54

102:22 104:23	153:7 155:9	19:12 20:18,21	135:2 138:1,2
109:17 141:8	157:11 190:14	22:9 23:9 24:6	138:5,10,21
166:12	<b>thank</b> 6:12 7:18	24:24 26:23	139:13,21
<b>testify</b> 97:14	34:4 56:20	28:11,11 31:2	140:21 141:6
105:19	59:17 60:1	31:8 34:1,5,11	142:1 144:19
<b>testifying</b> 193:5	65:23 67:24	35:10 36:14	145:1,13
<b>testimony</b>	68:1 70:20	39:3,5 40:11	148:19 150:2
10:21 32:7	100:23 108:1	53:3 54:8,13	153:8 155:24
37:17 39:16	120:6 141:13	54:19 55:1	156:9,11,24
40:5 47:12,14	153:24 154:14	57:6 64:6,7,8	157:6 159:20
47:15 48:7	181:23 188:13	65:4 66:2 67:1	159:23 160:13
49:13 52:10	192:4	69:16 72:14,16	161:15 167:9
58:23 59:16	<b>thanks</b> 66:1	74:16,21 75:9	169:1 170:5
63:22 65:13	96:15 126:4	75:16,17 76:5	172:7 175:22
66:11 68:11	<b>theirs</b> 188:6	77:6,10 78:19	178:7 182:9,11
70:22 71:19,24	<b>thing</b> 49:9	82:24 83:8,9	182:21 186:1
72:19 73:4	75:24 85:24	83:18 84:3,11	<b>think's</b> 67:14
76:4 80:11	90:16 103:2	87:11,11,18	72:14
85:6 86:22	105:6 145:20	90:8 92:23	<b>thinking</b> 15:2
91:24 97:1,16	173:7 179:24	95:19 97:19,24	17:17 53:11
99:11 100:4	<b>things</b> 6:15	98:5,5 99:21	85:17,23 88:4
104:7,11	21:5,8 44:18	100:10 102:12	134:4,9 159:23
107:17 109:14	44:21 46:6	104:4 106:1	160:4 173:7
111:2,19	48:23 49:3	107:5 111:6,11	<b>thinks</b> 75:18
112:21 113:1,6	52:14 54:7	111:12 113:2,5	<b>third</b> 11:19
113:22 114:12	57:23 60:16	113:7,12,19	23:4 25:3 30:5
114:20 116:15	87:12 95:5	114:20,23	38:3,21 45:13
117:21 118:23	118:14,18	115:6,17	49:21 50:17,21
121:14 122:14	139:22 142:10	116:14,16,19	53:22 57:1
123:18 124:7	160:5 166:1	116:22 118:8	61:5 68:12
129:4 130:5,20	<b>think</b> 10:14	118:12,21	69:11 71:9,11
134:3,5 138:22	11:7,12 12:3,6	120:7 122:23	71:14 72:10
142:8,15 143:4	12:13,16,18,20	123:1,2,2,21	93:22 94:9
144:2,8,13,19	14:1 15:24	130:6 132:22	101:21 102:4,8
144:21 145:4	17:3,8 18:21	134:11,14,23	102:15 105:12

[third - towards]

Page 55

105:16 109:16 111:10,17 114:22 116:18 117:2 121:24 122:7,18 133:21,24 136:7 142:2 144:1 145:6 158:8 163:14 177:2 180:21 181:1 185:6 <b>thirdly</b> 85:8 <b>thought</b> 33:19 36:20 41:20 68:22 70:9 80:9 89:24 111:9 122:6 158:1,10 159:6 172:17 <b>thoughts</b> 93:14 <b>thousands</b> 151:9 <b>three</b> 10:24 17:20,22 18:8 32:16 43:23 68:10 71:8,16 72:3 95:16 99:4 100:24 112:19 122:8 122:14 126:10 126:21 181:18 186:18 <b>threshold</b> 124:4	<b>thrilled</b> 142:17 <b>tie</b> 6:7 140:24 155:10 <b>tied</b> 185:5 <b>till</b> 8:10,18 <b>time</b> 1:14 8:13 15:9 16:13 19:9,19 20:4 20:24 41:10 46:17 49:11 51:17 58:1 62:7,19 76:21 97:9 103:24 105:15 124:18 129:23 139:17 146:18 153:23 160:11,20 164:4 165:24 166:3,4 167:2 168:10,15 172:22 174:3 176:2 177:6 179:22 180:24 183:1,2 184:2 184:3,22,24 185:13 186:4 186:21 187:4 187:12 191:14 <b>timeframe</b> 31:10 117:17 137:2 170:3 191:8 <b>times</b> 57:16 105:11 111:16	<b>tiny</b> 18:15 <b>titled</b> 6:18,23 <b>today</b> 7:17 8:2 8:5,17,24 12:22 28:15 60:4 67:12 113:19 137:1 140:19 143:1 165:20 171:6 173:3,20 174:5 184:12 191:9 191:16,23 192:1 <b>today's</b> 9:14 112:13 115:10 165:15 <b>together</b> 167:18,21 174:2 187:1,7 <b>told</b> 41:3 73:7 74:3 76:18 77:7 88:11 96:13 101:12 104:9 120:23 143:20 186:7,7 190:2,7 <b>tons</b> 46:23 <b>took</b> 11:10 25:22 43:1 60:5 132:6 133:8 154:7 180:8 188:8 <b>top</b> 11:24 <b>topic</b> 12:3 28:18 34:24	36:12 39:6 66:20 86:9 99:17 116:24 120:3 128:24 129:4 155:15 <b>topics</b> 10:21 29:21 33:18 35:11 38:5 40:18 41:16 43:20 45:16 59:3 60:24 74:20 79:5 113:9 144:24 181:18 191:5,9 <b>torres</b> 19:8 31:12 35:21,23 38:10 47:17 48:5 49:13 50:24 64:19 79:4,11 80:18 80:21 97:3 128:23 135:17 139:13,19 141:8 143:23 145:22 <b>total</b> 173:24 177:9 <b>touch</b> 29:21 59:21 <b>touted</b> 123:20 129:7 139:24 153:10 <b>touting</b> 140:4 <b>towards</b> 100:3 130:15
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[track - understand]

Page 56

<b>track</b> 169:1 188:11,11 <b>traditional</b> 18:11 <b>transaction</b> 106:15,16 <b>transcribed</b> 58:4 <b>transcriber</b> 194:1 <b>transcript</b> 84:13 89:8,24 101:9 108:10 109:2 112:12 143:18 194:3,5 <b>transcriptionist</b> 193:8 <b>transcripts</b> 45:19 <b>transfer</b> 41:3 <b>traveling</b> 189:21 <b>treat</b> 134:14 <b>trial</b> 66:7 84:14 99:15 100:3 114:19 140:10 158:6 187:23 <b>trials</b> 184:24 <b>tried</b> 43:10 46:2 86:10 135:15 168:22 190:20 191:13 <b>triple</b> 188:11 <b>true</b> 16:21 41:21 58:7,11	96:7 103:16 114:1,1 132:7 136:18 159:21 189:3 193:9 194:5 <b>truly</b> 63:24 <b>trust</b> 191:3 <b>truth</b> 107:4 190:22 <b>try</b> 8:23 10:19 31:2 42:5 58:15,17 59:1 67:8,19 68:6 69:12 75:1 84:23 91:10 95:7,8 112:11 117:8 122:21 164:19 170:16 170:17 174:2 175:11 191:16 191:18 <b>trying</b> 22:8 46:10 91:16 138:18,21 139:1 151:1 162:18 169:2 <b>turn</b> 10:6 20:22 31:5 32:18,20 58:16 126:1 127:11 141:14 175:13 181:6 181:24 <b>turned</b> 58:11 <b>turns</b> 57:17	<b>tweak</b> 34:1,6 <b>two</b> 6:17 14:24 17:19,22 19:17 25:8 26:3 35:18 37:7,20 37:22 38:12 39:10 44:20 51:5 52:18 54:7 60:9,12 71:6,7,7 89:6 95:16 112:17 122:11 124:16 129:17 130:9 131:4 134:10 139:22 141:8 148:12 160:14 171:13 172:4 177:11 179:2 185:17 186:14 187:6 191:6 <b>type</b> 143:2 166:5 <b>typewriting</b> 193:7 <b>typically</b> 70:1 <b>u</b> <b>ultimate</b> 49:4 99:1 <b>ultimately</b> 25:13 80:7 82:22 113:2 128:6 130:14 176:20 177:14 178:12,14 189:10 190:6	190:11,18 <b>umbrella</b> 38:4 <b>unable</b> 181:9 <b>unclear</b> 130:1 <b>undated</b> 160:19 <b>under</b> 10:13 11:13 38:4,14 47:14 65:12 66:7 73:15 135:20 152:6 153:5,20 156:9 166:12,24 177:12 <b>underlying</b> 71:20 79:18 81:23 82:4 87:9 <b>underpinnings</b> 110:10 <b>underscore</b> 45:7 <b>underscores</b> 39:15 <b>understand</b> 10:2 17:5 30:22 43:22 61:23 68:8 83:4,9,15 86:10 91:8,14 97:18 111:6 121:6 124:11 125:14,14,18 125:22 131:23 132:21 134:17 134:23 137:20
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

[understand - vehicle]

Page 57

138:10 139:4 143:6 156:4 157:18 162:18 182:1 189:5 <b>understanding</b> 48:11 77:17 106:10 118:3 126:19 130:12 130:17 187:14 <b>understands</b> 35:22 <b>understood</b> 36:20 84:22 92:18 137:6 142:19 176:10 184:21 <b>undisputed</b> 130:7 156:11 169:17 <b>unduly</b> 132:9 133:10 <b>unfortunately</b> 66:2 185:2 <b>unilateral</b> 179:19 <b>unique</b> 24:1,20 28:8 39:15 44:9,10 47:1 48:2,2,8 55:14 55:17,21 56:14 57:13 58:21 61:1 62:23 63:18,19 65:16 65:18,21 66:12 66:24 98:15	<b>uniqueness</b> 66:18 <b>unit</b> 1:17 <b>united</b> 1:1 <b>universe</b> 164:23 191:8 <b>unlimited</b> 110:16 <b>unmuted</b> 99:23 <b>unreasonable</b> 63:15 <b>unreliable</b> 35:23 <b>unresolvable</b> 163:21 <b>unusual</b> 18:14 <b>use</b> 15:13,13 20:3 66:9 74:5 74:13 84:19,23 <b>used</b> 33:16 39:4 74:19 77:20 119:23 <b>useful</b> 39:22 <b>using</b> 74:19 128:7 <b>usual</b> 59:9 <b>utility</b> 78:22 <b>utilized</b> 10:14 <b>utilizes</b> 10:14 <b>utmost</b> 178:1 <b>v</b> <b>v</b> 1:7 148:5 152:15 <b>vague</b> 52:18	<b>valid</b> 34:14 120:13 178:16 <b>validity</b> 29:9 138:6 <b>valuable</b> 29:5 48:21 <b>valuation</b> 47:3 72:11 85:9,16 85:16,18,22 86:5,6,6,13,15 86:23 87:1,5 88:3,15 89:1 89:23 90:5,11 90:24 91:3,19 101:1,15 102:4 102:15 103:1 103:10,13 105:7,8,24 106:2,13,24 107:16 108:6 108:20,22 109:4,17,22 110:1,10 114:23 115:2 116:4,9,24 <b>valuations</b> 85:13 87:9 102:16,18 <b>value</b> 15:3,4 23:21 29:14 38:9,11 49:1,4 49:22 50:2 51:3 73:24 86:8 88:9,22 89:11,17 90:14	90:15,22 91:5 91:19 92:2,2 92:11,12,19 93:8,13,14,16 93:18 94:2,7 94:14,20 101:21 102:1,8 102:23 103:17 103:23 104:21 105:12,16 108:11,15,19 110:11 111:3,3 111:11,17,22 111:24 125:16 127:3,24 128:7 130:17 134:24 135:10 138:2,7 138:7 139:3,3 141:1,10,23 142:3 144:10 144:15,15 146:23 147:9 149:17 150:10 150:17 151:23 153:16 155:13 155:22 156:18 157:9 <b>values</b> 128:7 <b>various</b> 33:10 43:13 165:10 171:11 <b>vast</b> 16:11 19:5 65:18 161:18 <b>vehicle</b> 97:13
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## [venue - withdrawal]

Page 58

<b>venue</b> 82:21	<b>waited</b> 182:17	<b>wants</b> 99:22	<b>weader</b> 1:19
<b>veracity</b> 44:18	186:12	<b>warecorp</b>	193:2,18
<b>versus</b> 91:11	<b>waiting</b> 67:4	41:23	<b>weaknesses</b>
<b>vevo</b> 99:6 140:2	<b>waived</b> 172:9	<b>washington</b>	135:11
<b>viable</b> 121:19	<b>waiving</b> 21:16	4:10	<b>webinar</b> 63:4
<b>video</b> 9:18,20	<b>walk</b> 105:10,14	<b>watkins</b> 4:8 8:2	<b>webinars</b> 57:18
9:21 63:3	<b>walked</b> 59:3	32:24 70:16	57:21 140:7
<b>videoconfere...</b>	<b>want</b> 9:20 14:5	<b>way</b> 3:16 9:5	<b>week</b> 171:6
1:12 2:3,4,12	18:24 21:24	11:6,8 13:23	173:3,20 174:5
2:13,14,15 3:3	31:4 34:24	14:17 15:16	176:21 183:17
3:4,14 4:3,4,5,7	40:20 41:17	18:2 22:24	191:23 192:2
4:21,22,24	42:3 57:24	27:20 43:7	<b>week's</b> 187:4,5
9:16 10:3	58:16 59:21	48:13 59:13	<b>weeks</b> 177:11
112:13 192:1	90:3 101:2	60:4,18 68:7	178:16 179:2
<b>videos</b> 63:1	107:12 109:10	69:18 102:7	186:15
<b>view</b> 10:11,12	111:18 116:7	113:5,15,17	<b>went</b> 20:9
23:10 65:8	118:20 125:17	115:15 129:9	21:12 127:12
74:5 75:18	125:22 132:21	138:6 141:23	<b>west</b> 2:17 35:3
92:2 93:12,18	135:4 137:20	142:20 156:17	<b>what'd</b> 103:18
94:11 95:24	143:6,7 151:16	159:2,8,9	<b>where'd</b> 88:8
96:2,11 103:17	152:14 153:15	160:12 165:7	<b>wholly</b> 153:5
110:20 112:19	159:10 171:5	172:21 188:16	<b>willfulness</b>
116:2 120:17	174:20 175:11	<b>we've</b> 37:6 41:2	132:11 133:11
131:16 141:12	178:5 181:6	44:9,22 46:12	<b>willing</b> 41:5
143:7 157:16	184:19	55:16 59:2,14	86:12 102:24
<b>vis</b> 26:13,13	<b>wanted</b> 12:14	86:1 99:4	186:5,10
28:9,9 66:12	27:15 41:1	102:20 104:7,9	<b>wilmington</b>
66:12 93:14,14	78:8 100:16,20	106:12 126:12	1:18 2:7 3:8
138:6,6	108:20 110:15	127:14 131:12	<b>window</b> 184:23
<b>volumes</b> 16:20	111:8 112:20	133:23 142:14	<b>wish</b> 173:13
<b>vs</b> 6:19,23	119:12 120:9	142:16 145:15	192:2
<b>w</b>	132:12 151:24	151:9 161:18	<b>wished</b> 159:2
<b>wait</b> 39:20	159:16 160:20	162:10 166:2	<b>wishes</b> 117:4
182:15	<b>wanting</b> 103:15	168:11,18	<b>withdrawal</b>
		169:9 170:8	41:9 114:19

[withdrawn - zero]

Page 59

<b>withdrawn</b> 119:2 123:10 <b>withholding</b> 71:1 170:9 <b>withstanding</b> 170:11 <b>witness</b> 35:23 36:1 66:20 75:11 76:14 78:15 90:6 92:1 97:14 120:19 121:17 136:6,10,10 152:22 179:14 179:19,21 181:11,19 182:8 183:6,12 187:7,8 188:1 190:5,13 193:4 <b>witnesses</b> 13:18 14:7 40:8 41:2 41:13 50:15 51:4 52:1,9,21 78:11 80:1 95:1 134:1 136:21 153:4 182:18,19 185:21 187:22 188:10 <b>wonder</b> 10:11 <b>wondering</b> 10:18 54:4 92:3 136:17 <b>words</b> 35:23 67:11 87:14	104:15 <b>work</b> 29:19 30:2,9,14 40:17 62:16 70:5 115:22 117:7 130:16 135:14,21 136:5 147:8,22 148:1,20 149:4 149:10 159:3 162:10 164:19 165:6 166:18 170:10,22 171:24 172:12 173:14 187:1 190:7,19 <b>worked</b> 18:6 180:20 <b>working</b> 19:14 <b>world</b> 78:15 <b>worth</b> 51:8 107:5 128:2 138:2 <b>would've</b> 23:16 49:2 50:3 51:5 64:1 102:11 105:14 138:12 145:2 147:6 178:1 180:19 181:16,17 188:1,2 <b>wrap</b> 188:21 <b>writ</b> 156:4 <b>write</b> 44:13	<b>writing</b> 75:12 <b>wrong</b> 12:20 82:13 111:7 142:4 144:13 150:19 <b>wrongly</b> 134:4 <b>wyogotschell</b> 31:9,10	<b>z</b> <b>zero</b> 169:15